NATIONAL OPEN UNIVERSITY OF NIGERIA

SCHOOL OF LAW

COURSE CODE: LAW 233

COURSE TITLE: THE LAW OF CONTRACT I

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NATIONAL OPEN UNIVERSITY OF NIGERIA

LAW 233 **THE LAW OF CONTRACT I**

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Published by:
National Open University of Nigeria 2008

First Printed 2008

Second Printed 2014

ISBN: 978-058-856-6

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MODULE 1 LAW OF CONTRACT

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1.0 INTRODUCTION

You may not be able to arrive at any universally acceptable definition of law, but you can describe it to an acceptable standard. The law of contract is an integral part of those rules in the Nigerian Legal System, pervasive and to a greater or lesser degree, 'omnipresent'. It is, literally, everywhere in our lives. The relationship we enjoy with our employers; your status with NOUN as a learner on this course; the holiday you have booked with your travel agent; trips on the business venture you have formed with your colleagues; the clothes you frequently drop off at the laundry – these and myriads of other examples typifying an underlying contractual element that much of the time

we take for granted. Common buying and selling any article whatever in the market, shop or roadside or boarding buses or taking taxi-cabs have contractual elements.

How then, in general terms, can we gain an enlightened view of this aspect of the law that represents such an important aspect of our lives? How can we understand better the laws of contract that are particularly applicable to the commercial world in which we function? And now, in particular, can we acquire the requisite knowledge and skills needed to handle the activities, assignments and the final examination?

LAW 233 THE LAW OF CONTRACT 1

This course is designed to provide as much as possible a comprehensive study of the contract as you are studying for accreditation in a legal capacity. Hence, you need to acquire a reasonable knowledge of some of the key principles Law of Contract. Consequently, you will be expected to demonstrate skill in recognizing and implementing a preliminary analysis of a given legal problem and offer suitable advisory or drafting skill in the self Assessment Exercises.

The objects of the material are threefolds:

- To enhance your knowledge of key aspects of law of Contract
- To outline a resource base of information about legal development past and present.
- To provide you with practice in legal reasoning, by way of Self Assessment Exercises and Tutor-marked Assignments. By working through the exercises, you will acquire the skills needed to score high marks in the Assignments and the Final Examination.

You will learn to appreciate that the law only recognizes and enforces agreements which, upon their formation, exhibit certain essential characteristics – the building blocks' of a contract. In addition to the underlying presumptions that contracts have (for example, those which are not contracts at all, but merely social agreements), you will study the principles surrounding their formation: intention, offer and acceptance, consideration, capacity and intention to create legal relations. These are factors which are fundamental to the formation of a contract.

You will then examine how failure to comply with the rules governing the formation of a contract will render it potentially ineffective to a greater or lesser degree. You will learn the distinction between void, voidable and unenforceable contracts and the impact that trade usage, business efficacy and previous business dealing may have in the relationship between the parties. You will study clauses related to restraint of trade in relation to employment, the sale of a business, and agreements to fix prices.

The terms of a contract, inherent in all contractual dealings, are also studied, both implied and express. You will encounter the difficulties related to conditions and warranties and the respective remedies to which a party may be entitled in the event of a breach.

As an example of an express term in a contract, you will study exclusion, or exemption clauses, in which a party attempts to limit its liability in the event of a breach of its obligations. Underlying these various concepts and principles, you will begin to appreciate that the law of Nigeria is an often subtle mix of common law and equitable considerations, as modified by statutory enactments.

However, before you commence reading, we would like to make a few comments regarding the content of Self Assessment Exercises, Tutor Marked Assignments and the Final Examination. In all the questions you are asked to cover, you will be given both 'single issue' problems, and problems where there may be two or more issues. Sometimes, we will identify the issues for you; more often than not, you will have to spot them for yourself. If you fail to spot the issue or issues, then clearly you are facing a serious problem in arriving at an appropriate answer.

2.0 OBJECTIVES

When you have studied this course, you should be able to:

- Know what is a contract
- Outline the underlying presumptions of contract as distinct from social agreements.
- Outline the elements, which constitute a contract: offer and acceptance, consideration etc
- Explain the distinction between contracts which are void, voidable and unenforceable.
- Describe restrictive covenants and their relevance to employment, sales of business and agreements to fix prices.
- Examine further the terms of a contract – implied and express – and their relevance to conditions, warranties and innominate terms.
- Explain the significance of exclusion or exemption clauses at common law and by statute.etc

CHARACTERISTICS OF A CONTRACT

We will examine the following:

- How do we identify a contract and confirm that one exists?
- How does the contract, if indeed it exists, operate and protect the parties?
- How do we enforce the contract if something goes wrong?

Consider these aspects very carefully as they offer an appropriate 'shorthand' route to the underlying aspects of what represents a vast area of the contract law. As we have already noted in the Overview to this Unit, contract law is the foundation upon which Commercial Law rests.

Although this may seem a case of putting the cart before the horse, pay particular attention to the third point that has been made. How do we enforce the contract if something goes wrong; or alternatively, what 'remedies' are available to the injured party if indeed something has

'gone wrong' and the other participants in this contracting process refuse to cooperate? This rule is crucial to the Law of Contract and it is analogous to when you are

feeling ill and seek medical help. In the latter case, you hope your family doctor will be able to prescribe a 'remedy'

and make you feel better. In other words, when you consult your lawyer, you hope he or she, depending on the merits of your case, will be able to obtain a suitable remedy.

To complete this analogy in contract law, the parties have recourse to the legal process if one is in default. We will study this concept in more detail. In the meantime, bear in mind that ideally, parties to a contract want nothing more than a successful conclusion to whatever it is they have agreed upon as the particular subject matter. In short, both hope that the contract will be 'performed'. Neither wants something to 'go wrong' and have to resort to our adversarial process of litigation in the courts. Unfortunately, although most contracts are successfully concluded, we live in a world that is far from perfect and parties to a given contract do not always behave themselves. And sometimes, as you will see, an innocent party in a breached contract may emerge in worse shape than the defaulting party, a concept known as unjust enrichment.

When there is a contractual dispute, as you will see from the cases you read, the parties are obliged to seek help in the courts, in which case someone will win – and someone will lose. The parties to a dispute may often settle differences by settlement out of court; in which case the matter will not be 'reported' and we will be denied the opportunity to extricate a point of law that might help us in our studies. Remedies therefore constitute a not always pleasant culmination of a dispute between individuals, between corporations and between individuals and corporations and sometimes between individual or corporation and the State. Keep this in mind as you proceed with consideration of our first 'rule' of contract: does one exist?

3.0 MAIN CONTENT

3.1 Meaning of Law of Contract

Defining a generalized concept like Contract is a little bit difficult. It is perhaps an over simplification to say that it is a "legally binding or enforcement agreement" it should be noted that, there are some definitions which have become by virtue of their having a common theme.

Treitel defined Contract as "an agreement giving raise to obligations which are enforced or organized by law. The factor which distinguishes Contractual from other legal obligation is that are based on the agreement of the Contracting parties."

Anson defined Contract as a branch of law which determines the circumstances in which a promise shall become legally binding on the person making it.

Yerokun defined a contract as a promise or set of promises, which the law will enforce. Contract is mainly concerned with relation between persons, which the law will recognize and enforce where one of parties fails to perform his part of the bargain.

American Restatement (2nd) of the law of Contract 1978 defines it as … a promise or set of promises for the breach of which the law gives a remedy or the performance of which the law in some way recognizes as a duty.

Okany defined "a Contract as an agreement in which is legally binding on the parties to it and which it broken may be enforced by action in court against defaulting parties".

Also Okonkwo and Ilegun, defines Contract as an agreement which is legally binding on the parties to its and which if broken, any be enforced by an action in count against the defaulting party.

Chitty, defined Contract as a promise or set of promises which law enforce.

It is worthy of note that, from the above, it can be seen that the common theme underlying all attempts to define the term "Contract" is that there must be an agreement. The idea of Contract as being based on agreement was introduced into English legal discussion only in the nineteenth century and does not accord with the raw material of the common law particular in relation to the requirement of consideration. English law does not general enforced gratuitous promises, the element of non-gratuity being expressed technically by the requirement that some consideration must move from the promises and in lay terms that it enforce bargains rather than agreement.

It should be noted that, it is in relation to the requirement of modern usage most readily relies on the language of promise, not consideration for party's agreement. It is also

obvious that, another justification for the enforcement of Contract is said to lie in the moral obligation of a party to perform his promise.

Moreover, one element which is common to all the definition of Contract is that the need for a prior agreement between the Contracting parties, which will give rise to enforceable rights and obligations.

The requirements of agreement had led certain juristic writers, especially those of the nineteenth century to place greater emphasis upon the consensual nature of Contractual obligations. "The essence of a contract, it is said, is the meeting of the minds of parties in full and final agreement, there must be in fact, *"consensus ad idem"*.

Consensus ad idem is an agreement of parties to the same thing: as a meeting of minds. It is the coming together of two minds with a common intention: if the terms of an agreement are Vague or illusory no binding Contract will emerged from it. For there to be *consensus ad idem*, a Contract must of necessity involve, at least, the parties to it, for it is unrealistic for a person to Contract with himself.

3.2 Is There a Contract?

Before we examine what is commonly referred to as the 'elements' of a contract, there are underlying presumptions upon which this analysis is based and which you will encounter in this and other units:

- There are countless 'agreements' which are part of our daily lives (to take a holiday, or to meet for dinner at 7.00 pm Friday) which are largely 'social'whichdo not constitute a legal obligation which is enforceable in law.
- A contract in the legal sense is a form of agreement which a particular person will recognize as legally binding.
- In the Common Law System, we subscribe to the concept of 'freedom of contract'; that is, parties to an agreement are completely free to lay down their respective rights and obligations, provided of course they comply with existing laws or other 'rules' which the particular society has prescribed.
- There is a presumption, not always considered by the courts, those consumers (and we are all 'consumers') possess an unequal bargaining position in their dealing with the world of commerce.
- There is a presumption that in commercial agreements, say between the XYZ Bank Plc and the Nigerian Government, that the parties occupy equal bargaining power and as such they intend to be bound in law by whatever it is they have agreed upon.

Keep these concepts in the back of your mind as you work your way through the course and the various cases to which you will be referred.

3.3 What Constitutes A Contract?

By now, you should understand that legally binding contracts provide the basis for commercial transactions as well as performing a significant role in various 'private arrangements between individuals: buying and selling a flat or purchasing a new car or a packet of toothpaste.

Remember you are about to study the "rules" of: what constitutes a contract? Consider the word 'rule' carefully, as there really are no 'rules' to the Law of Contract in common Law or any other aspect of the law. There are concepts and principles certainly, and if there are rules, they are frequently refined by exceptions. But they are not rules in a finite, empirical sense. In the previous section, we referred to the concept

of 'freedom of contract'" the inherent right which individuals may apply to the contracting process. Is freedom of contract a rule or concept? Certainly no if, among other things, we consider unequal bargaining power as a factor for instance, the effect of duress or undue influence..

3.4 The 'Building Blocks' Of a Contract

With the comments noted above, let us turn to the 'building blocks' of a contract. As we have encountered before, in trying to define 'law' and pinpoint the sources in Nigeria the preferred approach is not to seek a concrete, definitive conclusion but to take an overview, encompassing all of the points made, plus certain prescribed elements which we will now outline.

This is the prelude to our analysis of just what constitutes a contract; that is, an agreement made between parties who truly intend to be legally bound in their relationship. The 'constituent' elements of a contract vary from writer to writer. Do not be disturbed by this apparent inconsistency. Writers have broken down the building blocks of a contract into five parts:

Offer

Acceptance;

Consideration;

Intention to create legal relations;

Capacity;

We point out these apparent anomalies not in an effort to confuse, but rather to emphasis the vast area which our law embraces and the different perspectives from which it is perceived. We will study all these aspects of the contracting process as we work our way through this course.

SELF ASSESSMENT EXERCISE

i) Distinguish between 'agreement' and 'contract'.

ii) Outline five 'constituent elements' of a contract.

You are now ready to examine the first of the essential contractual elements by which we can assess whether or not a legally binding agreement exists, as distinct from an agreement where the parties are not legally bound to each other.

4.0 CONCLUSION

We have had an introduction into the law of Contract and have discussed characteristics and the building blocks of a contract.

5.0 SUMMARY

In this unit, you have been offered a bird-eye view of what contract law is all about. You can now define and describe the term "Contract". With what you have learnt about contract, you are able to identify a contract when you meet with any.

6.0 TUTOR MARKED ASSIGNMENT

A renounced judge once said "If there is one thing which more than another, public policy requires, it is that men of full age and competent understanding shall have the utmost liberty of contracting and that contracts when entered into freely and voluntarily shall be held sacred and shall be enforced by courts of justices" per Sir Goerge Jessel, MR: Discuss

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MODULE 1 LAW OF CONTRACT

UNIT 2 SOURCES OF LAW

CONTENTS

1.0 INTRODUCTION

We are beginning to look into the Sources of Law. It is perhaps important to distinguish Sources of Laws from Sources of Law. When we look at law as series rather than as a

system, we may refer to Source of Law, which may include sources within and outside the law properly so called. In this lecture, we are concerned with a legal system and our focus is on legal Sources of Law. We shall look into some theories, some of which appear to ally with Social Contract Theory or Marxism as the case may be: Autochthonism will receive some attention so as to evaluate how home grown or alien our sources are and the essence, if any, of change.

2.0 OBJECTIVES

The objective of this lecture is that at the end, you should be able to understand the meaning of terms use, the classes, and the theories of sources as well as the autochthony of law.

3.0 MAIN CONTENT

3.1 The Meaning of the Term "Source(S)" According to Black Law Dictionary

The term "Source(s)" (also termed fons juris) may mean the origin and defined source of law as something (such as a constitution, treaty, statute, of custom) that provides authority for legislation and for judicial decisions; a point of origin for law or legal analysis authoritative statement from which the substance of the law is derived. It may also be described as: "something (such as a Constitution, Treaty, Statute, or Custom) that provides authority for legislation and for judicial decisions. A source of law is the point of origin for law or legal analysis.

You may have observed lawyers in Court, when they make statements and refer the Court to particular decided cases, the Law Reports where such cases can be found, to some Act or Statute and pointing to a particular chapter, part or section. We say that the Law Reports and the Statute or Act so cited are sources of his authoritative statements or law.

In literature of jurisprudence, the problem of "Source(s)" relates to the question: Where does the Judge obtain the rules by which to decide cases? In our present context: Where do we obtain the law we have been talking about – the law constituted in the Nigerian Legal System? In this sense of the sources of law, Fullers has listed the following: statutes, judicial precedents, custom, the opinion of experts, morality and equity. Fuller probably was concerned with "Sources of Laws" rather than Sources of Law – where the law generally draws not only its content but also its force.

In the context of legal research, the term "Sources" connotes

(i) the origin of legal concepts and ideas

(ii) governmental institutions that formulate legal rules

(iii) published manifestation of the law

3.1.1 Classes of Sources of Law

Sources of Law may be classified into formal or material, and the latter further subdivided into historical, legal, authoritative and binding, or other sources.

3.1.2 Formal Source

A formal source is what gives validity to the law.Upon what authority is the National Open University established?

Upon an Act of the National Assembly, Who gave the National Assembly authority to legislate?

The Constitution, Where does the Constitution derive its power?

The general will and power of the people of Nigeria. This is the Ultimate Source. Thus the formal source of law may be traced to the "common consciousness" of the people, or the "Divine Will".

3.1.3 Material Source

Here we are not concerned with basis of validity as we did in our discussion of "formal source" of law. We are concerned here with the origin of the substance of the law – Where the law derives from or the authoritative source from which the substance of the law has been drawn. This may be

(i) Historical

This may comprise the writings of lawyers, e.g. the rules and principles of foreign law. The writings do not form part of the local law until they are formally received or enacted into law. Prior thereto, they serve as persuasive authority.

(ii) Legal

These are sources that are recognized as such by law itself. Examples are statutes, Judicial Precedent and Customary Law

3.1.4 Authoritative And Binding Source

This refers to the origin of the legal rules and principles, which are being enacted or formulated and regarded as authoritative and binding. Examples are legislations (Received law and Local statutes), judicial precedents (Common law and Equity; and local precedents) and Customs (Customary law).

3.1.5 Other Sources

These are non-formal sources or origin of legal rules that lack authority, but are persuasive merely. Professor Elias considered the "Source of Law" in terms of the main-spring of its authority and classified this into six categories; namely:

(i) Local Laws and custom

(ii) English Common law, the doctrines of English Equity and Statutes of general applications in force in England on 1st January, 1900.

(iii) Local legislation, and the interpretations based thereon

(iv) Law Reports

(v) Textbooks and Monographs on Nigerian Law

(vi) Judicial Precedents

There is no hard and fast rule on classification of Source. What is of essence is knowing or identifying the sources themselves and the theories that have been proffered.

3.1.6 Theories of Sources of Law

Legal writers have proffered sources of law, which may neatly be discussed under three headings:

3.1.7 Consensus Theory

This theory conceives of a legal system as a product of consensus idea of society, functioning as an integrated structure, whose members agree on the norms, rules, and values, which they have mutually and voluntarily agreed should be uniformly respected. In Nigeria, sovereignty and supremacy reside on people, not their ruler and these people are represented by the members of the House of Assembly, House of Representatives and the Senate, who make laws on their behalf. In the traditional chiefly and chiefless societies, the monarch and chiefs declare what the law has always been from time immemorial, and where they are in doubt, they consult, The Book, the Quaran, or the Oracle.

3.1.8 Conflict Theory

The conflict theory is to the effect that the society is made up of series of conflicting and competing groups, and law and legal system is a dictate of the wealthy and powerful in the society to perpetuate their positions, and class interests.

Whether the lawmakers are wealthy or go into lawmaking in order to acquire wealth or get wealthier is arguable. However, there is freedom of expression at the floor of the

Houses and immunity from liability from what goes on there. Dictates of wealth or power, does not therefore appear real or apparent in passing of bills into law.

3.1.9 Other Theory (Middle Course)

There is a middle course between Consensus theory and conflict theory. This middle of the road approach argues that Legal system is the handiwork of those exercising political and legal powers of state, not necessarily to protect their own class interests, but expressing the definition of the privileged group, their values, notions and morals.

3.1.10 Autochthonism

Legal Theorists have raised further argument of how much of our laws and their sources are autochthonous. Autochthonism or autochthony pertains to the nativity of the law. That is to say, the extent to which the law is or is not indigenous or native to the land in which it operates. Are the sources of Nigerian law indigenous (autochthony) or foreign (alien)?

An autochthonous legislation, for example, may be one which does not trace its validity to any foreign legislature; rather it is home-grown and rooted in the country itself. Autochthony has two aspects:

(i) Formal Autochthony

This relates to the "Source(s)" from which the law or the Court, derives its authority as law

(ii) Substantive Autochthony

This refers to the contents of the legislation or law e.g. the frame of government which the Constitution has established.

SELF ASSESSMENT EXERCISE 1

Account for the autochthony of the Nigerian constitution Let us consider some examples from other jurisdictions. Dr. de Valera's government of Eire, 1937 prepared a draft Constitution,

and presented to the Parliament for approval. Upon approval, he submitted the draft Constitution to the people in a plebiscite, which adopted it. Further example can be found in Papua New Guinea

SELF ASSESSMENT EXERCISE 2

Compare the enactment of the Constitution of Nigeria and of Eire: What difference do you observe.

4.0 CONCLUSION

Our focus, however, is 'the sources' of law in Nigeria. You learnt the meaning of the term 'Source', then its classification as well as the theories behind it and the extent to which the classes are home grown or alien.

5.0 SUMMARY

We have tried to examine the term: "the sources of law" rather than "sources of laws". The theories relating to sources range from consensus to conflict and middle of the road approach. These have been discussed. It is an open question whether the sources of our Constitution and laws are autochthonous (home-grown) or alien.

Contemporary writers including Professor Nwabueze have contended that the importance of legal autochthony relates more to the contents of the law rather than the origin of theConstitution (or any law) or substantive autochthony.

The argument for legal autochthony tends to excite nationalistic sentiments and perhaps pride. Legal autochthony is not to be desired for its own sake. Rather it is to be seen as a means of effecting changes in the Constitution (or any law).

6.0 TUTOR-MARKED ASSIGNMENT

Give an account of the difficulties met with in attempting to formulate a satisfactory classification of laws.

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MODULE 1 LAW OF CONTRACT

UNIT 3 CONCEPT OF BARGAIN

CONTENTS

1.0 INTRODUCTION

An agreement between parties for exchange of promises or performances. A bargain is not necessarily a contract because the consideration may be insufficient or the transaction may be illegal.

2.0 OBJECTIVES

At the end of this unit , you should be able to:

- Understand the meaning of bargain
- The importance of bargain

3.0 MAIN CONTENT

3.1 Freedom of Contract

The philosophy of individualism existed in English since 18th century and this was adopted in Nigeria. The freedom to enter into contract got an express approval in the Supreme Court case of ***Merchant Bank Nigeria Ltd. v. Adalma Tanker (1990) 5 NWLR (pt. 153)747 CA***, here the court said that the parties are bound by their agreements and the court will not rewrite the contract for the parties. The principle of freedom of contract was reinforced by Cohen who said:

The view that in an ideally desirable system of law, all obligations would arise only out of the will of the individual contracting freely, rest not only the will theory of contract but also in the political doctrine that all restraint is evil and the government is best which governs least N.J Dion 1932 46 Harvard Law Review 558.

The law of contract is the basis of all economic activities in a modern society. The concept is that the terms should be left to be determined by the parties, less regulated by statutes or courts, except to protect the weak and young from exploitation.

An eminent judge, Sir George Jessel MR., expressed 'freedom of contract' in this way:

> "If there is one thing which more than another, public policy requires, it is that men of full age and competent understanding shall have the utmost liberty of contracting, and that contracts, when entered into freely and voluntarily, shall be held sacred and shall be enforced by Courts of Justice".

One may ask how valid this is today in the hurly barley of Nigeria's commercial environment. It can now be argued that this lofty and entirely commendable ideal has been gradually eroded over the years in the face of the onslaught of an increasingly commercial, complex world.

Freedom of contract is workable only if the parties to a potential contract have equal bargaining power; failing that, the concept, is indeed a myth. We have already mentioned the bargaining power an average individual has – or lacks – when negotiating a line of credit with a bank. Later, we study some cases in which the inherent power of a major financial institution is abused to the detriment of the individual.

At appropriate time in the course, references are made to anactments, which have incorporated into them both common law and statutory provisions which imply certain terms designed to protect the individual:

The Sale of Goods Laws and The Companies and Allied Matters Act (CAMA), 1990 to name a few. Later, we will study in more details this important concept of terms which are frequently 'implied' at common law, as well as those which have been expressly incorporated into the statute.

3.2 The Concept of Bargain

A bargain is an agreement of two or more persons to exchange promises, or to exchange promise for a performance. Thus defined, 'bargain' as narrower than 'agreement' in that it is not applicable to all agreement, and broader than 'contract', since it includes a

promise given in exchange for insufficient consideration. It also covers transactions which the law refuses to recognize as contracts because of illegality."

The basis of the common law of contract, is bargain and a person who wishes to enforce a given contract must show that he or she has given consideration. In other words, to enforce a broken promise made by B to A, A must show that he or she has paid some price for that broken promise. This is the essence of consideration. Consideration, has been defined as follows: a valuable consideration in the sense of the Law may consist either in 'Some right, interest, profit or benefit accruing to one party, or some forbearance, detriment, loss or responsibility given, suffered or undertaken by the other': ***Currie V. Misa (1875) L.R. 10 Exch. 153.*** In practical terms, a unilateral or 'one-way' promise ('I promise to pay you N500,000 on your next birthday') is not binding on the promisor unless that promise has been given some form of consideration. Consideration may be either:

a) Positive: e.g. Promise to give, to pay, to do….., or

b) Negative: to e.g. promise not to do something one is entitled to do; to suffer a forbearance or loss. An act or forbearance of one party or the promise thereof is the price for which the promise of the other is bought and the promise thus given for value is enforceable: ***Dunlop Pneumatic Tyre Co ltd V. Selfridge & Co Ltd (1915) A.C. 847***. For the purposes of illustrating this important concept, we will ignore the fact that certain promises made under a deed – and signed, sealed and delivered – do not require consideration in the strict ***Currie V Misa (supra)***. The principle stated above is relatively easy to understand but its practical application, based on past cases on the subject, can raise difficulties. Sometimes a court will enforce a promise unsupported by consideration, which the promisee has relied on and has acted on to his/her detriment. (See promissory estoppel, later). That said, the common law principle surrounding the doctrine of consideration can be broadly stated as follows.

3.2.1 Unequal Bargaining Power

It is an equitable concept and can arise in cases involving economic duress. The mere fact that unequal bargaining power exists between the parties (an everyday occurrence!) is not, in itself, sufficient grounds for treating a contract made under those conditions as voidable. In this case, it was stated that, Equity will not relieve a party from a contract on the ground only that there is contractual imbalance not amounting to unconscionable dealing.

You will appreciate how uncertain this area of law is when you consider that Lord Denning in Bundy stated, among other things, that duress of goods, unconscionable contracts, undue influence and undue pressure all have a single thread that rests on inequality of bargaining power.

He felt that they should be united in a single concept. Unfortunately, the House of Lords did not agree with him and, in the ***National Westminster Bank case v. Morgan (1985) 1 All ER 191***, stated that although unequal bargaining power could be a relevant feature in some cases of undue influence, there was no need in contract law to, 'erect a general principle of relief against inequality of bargaining power.

3.2.2 Unconscionable Bargains

This is a mystery factor and has only been fleetingly referred to by legal writers over the years. However, as you have learned thus far, there are many contractual situations in which there is unequal bargaining power which can potentially give rise to unconscionable (unfair or oppressive) conduct.

As you have seen, unconscionable conduct was considered, but not found, in the solicitor/client relationship in the Westmelton (Vie) Pty Ltd case. Although there is, at the present time, no general principle of English law in this area has been developed in Australia, Canada and New Zealand and 'the following general observations can be made.

Statutory Considerations

The House of Lords in the National Westminster Bank (supra) case, indicated that the question of inequality of bargaining power was a legislative task. If a party can show a contract is 'unconscionable' — which is not defined — remedies are available. For example, the court may refuse to enforce it, eliminate the 'unconscionable' part and enforce the remainder, or alter or limit any such part which is deemed unconscionable.

Although 'unconscionable' is not defined, certain considerations will be relevant in attempting to establish that the other party's conduct was such that it is unquestionable:

- the relative bargaining positions of the parties;
- where conditions have been imposed which are not in the legitimate interests of one of the parties;
- whether the consumer understood the content of the documents;
- whether any undue influence, pressure or unfair tactics were used against the consumer;
- whether or not under the circumstances the consumer could have acquired identical or equivalent goods or services from another party.

It has to be admitted that this is an uncertain area of law that needs some increase of consistence in approach. To show that unconscionable conduct has induced a party to enter the contract, such onus or responsibility lies with that party. This is quite the reverse

from a situation involving undue influence in which the 'stronger' party has the task of rebutting the presumption. The inherent problems in proving that the consumer has been the subject of unconscionable conduct may also prove difficult and potentially deprive him of any remedy.

3.3 Formation Of A Valid Contract

The main requirement of a valid contract are as follows:

a. There must be an offer

b. There must be an acceptance

c There must the contract must be consideration

d. Parties must have full contractual capacity

e. There must be an intention to create legal relations

See further the elements of a valid contract in ***Anwasi v. Chabasaya; Omidiji v. F.M.B. (2001) 6 NWLR (pt 731) 408 C.A. and Nwaigwe v. Transproject (Nig.) Ltd. (2000) 8 NWLR (pt 669) 364 C.A***

3.3.1 Forms Of Contract

Contracts supported by consideration are essentially expected to be in writing. It is, however, important to note that a contract may also be oral or implied and yet be binding on the parties depending on the peculiar circumstances. The fact remains that a contract may not be taken as being invalid nor enforceable for the mere fact that it is not in a written form. The court would normally not assist any person who was lured into an oral agreement. Writing merely facility fact that interpretation or proving of the term of the contract or else it may fact that necessary. There are some exceptions,

(a) Contracts that must be in writing

i. transfer of shares in a public company

ii. marine insurance

iii. hire purchase agreements

iv. bills of exchange

v. promissory notes.

The legal consequence of any non-compliance with the prescription is that such a contract shall be void and of no effect.

(b) Contracts which must be evidenced in writing

i. contracts of guarantee (under section 4 of the Statute of Fraud)

ii. Contracts for the sale of an interest in land

The legal consequence of non-compliance with this requirement is that such contracts shall not be enforceable at law though they may not be necessarily void as such.

4.0 CONCLUSION

The essence of bargain is to establish the terms of a sale or exchange of goods and services between parties. Through bargain, an agreement between parties fixing obligations that each promise to carry out is reached.

5.0 SUMMARY

We have learnt what is freedom of contract .We have also studied the concept of bargain and what formation of contract entails. However, take a break, tackle these questions and move on.

6.0 TUTOR-MARKED ASSIGNMENT

1. Wilberforce operates a computer consultancy firm and installs a 'state of the art' system in the offices of Shady Properties Ltd (SPL), for a contract price of N1.2 million. The quality of his system is not disputed by Managing Director of SPL, but when Wilberforce submits his statement of account, he receives a letter from the financial officer enclosing a cheque for N800,000 in 'full satisfaction'.

Poor Wilberforce already had 18 creditors chasing him and is in financial trouble. He explains this to Managing Director SPL who says, 'that's your problem, N800,000 is better than nothing', and, in addition, insists upon a receipt for 'completion of the account', to which Bill agrees.

He later consults you as to whether or not he can recover his balance of N400,000. Outline the arguments that will be presented by SPL and Wilberforce, and indicate what you think the courts would decide.

2. a. Your friend has negotiated a mortgage with Friendly Bank, to purchase a flat in the FCT. Six weeks later, he is having lunch with a lawyer friend who studies the mortgage document he happens to have in his briefcase. 'You're mad to have signed that' the lawyer exclaims, 'it's an unconscionable transaction and should clearly be set aside. Big banks should not take advantage of little guys like you'. Your friend cannot afford to pay the lawyer's hourly rate for advice, so he arrives in your office, where he knows the fees will be more reasonable.

How do you advise him?

b. In the Bundy case, the court held, among other things, that the guarantees signed by the old man in favour of his son could be set aside on the basis of the Bank's undue influence. If Bundy's lawyers had argued unequal bargaining power between him and the Bank, would it have been successful?

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MODULE 1 LAW OF CONTRACT

UNIT 4 CLASSIFICATION OF CONTRACT

CONTENTS

1.0 INTRODUCTION

Contracts are divided into different ways according to the nature of agreement reached by the parties and the nature and terms of the agreement.

2.0 OBJECTIVES

To understand the classification of contract

To differentiate the various classes of contract from the other

Appreciate the meaning and effects of the various classifications of contract

3.1 Classification Of Contract

A contract, depending on its nature, can be oral, written under seal or even implied from the conduct of the parties.

However, contracts are classified according to the nature and terms of agreement reach by parties.

3.2.1 Formal Contract

A formal contract is a contract made by deed. It is a contract of ancient origin and its validity from the form it is made. It is also known as contract made under seal. It must be made in writing, signed, sealed and delivered. Contracts made by deed do not need to be supported by consideration to be enforced in law. Accordingly, the significant of a

contract under seal is that it derives its validity from its form formal contract are usually employed in land agreements, such as conveyance, mortgage and gifts.

3.2.2 Simple Contract

All other contracts than formal contract are classified as simple contracts. They may be in writing or they may be oral. Oral contracts are also called parol contracts. The major factor between a contract under seal or a simple contract is that, in simple contract, only a person who has furnish consideration can bring an action to enforce the contract. The validity of the contract depends on the presence of consideration.

3.3 Express and Implied Contract

A contract is said to be express when the terms are clearly state and implied contract, when the terms are not so stated.

However, in an express contract, the extent of the respective obligation of both the offeror and the offeree are clearly stated either orally or in writing. The unique advantage of an express contract, particularly when it is written the parties can always refer to its for interpretation in case of controversy. A good example is where tenders are invited for a construction work, each applicant who responds to the advert will clearly state all the material terms such as the quality of the materials to be used, durability, prices, guarantee, term or mode of payment.

An implied contract is one which the terms are so stated either orally or in writing.

3.4.1 Bilateral and Unilateral Contracts

A bilateral contract consists of exchange of promise for a promise under a bilateral contract, both parties have outstanding obligations which they must fulfill under the buyer is obliged to pay and the seller is obliged to deliver the goods to the buyer.

In a unilateral contract, only one party is obliged from the onset while the other party is completely free whether or not to accept. A unilateral contract can simply be put as where one party is to set a stage for the other party to react or accept. It is a kind of standard contract which goes beyond offer to the whole world, where a reward is offered to anyone who finds an return a lost or stolen article, such as money, load or information leading to the arrest of a criminal. The classical case of ***Carlill v. Carbolic Smoke Ball Co (1893) I QB. 226***. illustrate the good example of a unilateral contract.

4.0 CONCLUSION

In this unit we have learnt about the various classification of contract and have also discussed how each contract differ from the other. We should bear in mind while considering the various classification, the importance of each of them.

5.0 SUMMARY

There are two basic types of contracts at common law – formal contracts and simple contracts. A formal contract is a contract made by deed. It is also known as a contract under seal. All other contracts are simple contracts, whether or not they are in writing or by word of mouth (parol).

6.0 TUTOR-MARKED ASSIGNMENT

1. Compare and contrast formal and Simple Contracts
2. Explain, with practical example and case law, Unilateral and Bilateral contracts
3. On 5 August 2009 Susan took a copy of the advertisement with her and called at her local Bigstore to inspect the Italia sofas. She spoke to Ben, the Sales Manager, and told him that she had decided to purchase the sofas subject to first talking this over with her husband. Ben told Susan that the company only had a limited number of two-seaters so it was agreed that she would leave N5, 000 in return for his agreement to hold the sofas for 48 hours. Ben told her that he would deduct the N5, 000 from the purchase price if Susan went ahead with the purchase within that time period. On 7 August 2009 Susan called at the store to purchase the sofas and spoke to Ben who was very apologetic but explained that his staff had forgotten to reserve the sofas for her. He explained that in any event the two-seaters were "subject to availability" (as stated in various notices around the store), and the company had now run out of them. Ben also said that "…obviously the two-seaters were a free gift and were subject to availability." He pointed out that the Italia three-seater sofa was still available but the price had now gone back up to N25, 000.

By reference to case law and statute or your own examples where appropriate: Explain the elements of a unilateral offer and how such an offer may be accepted.

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MODULE 2 FORMATION OF A CONTRACT

UNIT1 OFFER

CONTENTS

1.0 INTRODUCTION

An offer is a definite statement or proposition by one party called the offeror to another party called the offeree, clearly and precisely indicating the terms under which the offeror is willing to enter into a contract with offeree.

For a proposition to amount to an offer capable of acceptance, it must satisfy three conditions.

1. It must be definite, certain and unequivocal. In other words, it must amount to a definite promise to be bound, provided that certain specified terms ore accepted.
2. The proposition must emanate from the person liable to be bound if the terms are accepted, i.e., from the offeror or his authorized agent. A proposition made by a person having no authority to do so, purporting it to be an offer, cannot create contract if accepted.
3. The offer must be communicated to the offeree.

2.0 OBJECTIVES

When you have read this unit, you should be able to:

• Identify offer

• State when offer is accepted,

• State when offer terminates

3.0 MAIN CONTENT

3.1 Social Arrangements And Business Agreements

Although, you have gathered that it is often difficult to formulate 'rules' in your study of law in general and the law of contract in particular, we are from time to time in a position, to make an unqualified assertion which is not subject to some exception. In examining the tricky concept of intention, the courts have established that agreements fall into two distinct categories:

- 'Social' or domestic arrangements or agreements, usually made between friends or family members (a father's promise to take his son to a concert); and

- business or commercial agreements which totally exclude those agreements which are 'social' or 'domestic' in nature. An example is the Nigerian Government's agreement with ABC organization to build a cultural centre in FCT, Abuja.We must point out that both these statements represent what we call a 'presumption', a word you will frequently encounter in your legal studies. In other words, it is 'presumed' (or assumed) that social agreements are not intended to create legally binding obligations. Agreements between two business executives or two corporations are so presumed to have that intention of being legally binding. However, in both examples, the intention or the lack of it can be 'rebutted' or disproved so that the end result is quite the opposite.

An example of a social contract is seen in the case of ***Balfour V Balfour (1919) 2 K.B, 571***. In that case a husband on leaving England for Ceylon agreed to give his wife in England, some £30 per month but defaulted. The wife shed unsuccessfully because such agreement has sonal in nature and not legally enforceable. Also see Rose & Frank Co. V. Crompton Bros Ltd (1922) 2 KB 261 and Appleson V. Littlewood Ltd. In Wu Chiu Kuen V. Chu Shui ching (1991) the Plaintiff successfully secured in court his right to a 50% share in the winnings he had accumulated with

the Defendant. There was no agreement between both parties to split their winnings and there was no such contract. But the Defendant had made a 'gratuitous' promise withoutconsideration to Plaintiff that he would share his winnings. Consideration' is a critical element of a contract, but the judge found difficulty in establishing one between parties. Luckily for the Plaintiff, and rightly so, the judge ruled that there was between them an intention to create legal relations and thus split the winnings if $100,000.00. In Simpking V Pays (1955), the three parties – the Plaintiff, Defendant and Defendants grand daughter had a social/domestic arrangement for their joint participation in a Sunday newspaper fashion competition. The defendant and granddaughter required to hand over to the Plaintiff's one-third of the winnings. The court awarded him fair share.

Note also that the common law principle allows a party to walk away from a transaction, which is "SUBJECT TO CONTRACT". These three words mean there is no contract until one has validly entered into a contract.

3.2 Offer

It should be noted that, for a Contract to exist, there must be an offer from offeror to offeree, and an acceptance by the person to whom the offer is addressed.

An offer consist of any definite undertaking by one person to another that he is willing to enter into a contract with him on certain specified terms. Such an undertaking must be with the intention that will become binding as soon as the offeree accepts the offer. In other words, an offer is a proposition made by one person to another willing to be bound to the proposition. The offeror is the person that is making the offer while offeree is the person to whom the offer is made or addressed.

Sagay, defined an offer as a definite undertaking or promise made by one party with the intention that it shall become binding on the party making it as soon as it is accepted by the party to whom it is addressed:

Offer could be made orally, in writing or by conduct, owning to this fact, offer may take any form between an elaborate document with numerous clauses and sub-clauses and an ordinary everyday act or conduct such as routine activities daily performed by most homo-spapiens. For instance, the students who enter a bookshop makes an offer for the

book he selects and the seller show an acceptance by taking the payment of the price, the consideration. Similarly, each time a bus driver drives into a bus stop in Fajuyi Park of Ado-Ekiti for instance, his act constitutes an offer to render transport service to awaiting passenger to Ekiti State University. The passengers' act of entering into the bus and paying the bus fare is an acceptance of the offer. In the case of ***Union Banks of Nigeria Limited v. Sax Nigeria Limited (1994) 8 NWLR (p 346) 150 S.C***, the court held that, "an offer capable of being converted into an agreement by acceptance must consist of a definite promise to bound provided that certain specified terms are accepted". An offer could be take the form of an express offer to a definite person and express offer to the world at large and an offer implied from conduct.

The first category is the usual type of offer, where "OJo" offers to sell his car to "Dimeji" is capable of accepting and converting it into a legally binding promise, this is because the offer was addressed to a specified person.

In ***Boulton v. Jones (1857) I.J EX 117***, in the case, the defendant sent an order for certain goods to the shop of Broklehurst unknown to him the latter had on that day sold his business to a plaintiff. The goods were sent to Jones by Boulton. It was held that only

the person to whom an offer is specifically made is capable of accepting and enforcing the agreement. Pollock C.B. delivering the judgment said,

> ***"now the rule of law is clear that if you propose to make a contract with A, them B cannot substitute himself for A without your consent and to your disadvantage, securing to himself all the benefits of the contract. The case being that if B sued, the defendant would have the benefit of a set off which he is deprived by A's suing".***

Under the second category, an offer can be made to the public at large. Such offer can be accepted by anybody who performs the required services or fulfills the conditions set out in the advert. In the landmark case of ***Carlil v. Carbolic Smoke Ball Co. (CC) (1892) 2 qb 484; affd (1893) 1 QB 256***, the proprietors of a medical preparation offered to pay €100 to any person who contacted influenza after using one of their smoke balls in the specified manner for certain period. The plaintiff contract influenza after fulfilling these conditions. The court held that she was entitled to recover the €100 deposited in the Bank.

BOWEN L.J said in the expression of his own points that an offer can be made not only to an individual or a group of persons, but also to the whole world.

Also in the case of ***Agoma v. Guinness Nigeria Limited (1995) 2 NWLR (pt. 380) 672 S.C***, the court held on the validity of reward for the return of lost property. The supreme

court held that where an advertisement offer a reward for the return of a lost property, knowing of the reward offer, he is entitled to the reward.

As for the third category, the law may imply an offer from the conduct of the parties concerned. This implication is a question of fact to be decided by the court of law depending on the circumstances of the particular case. However, the test of the existence of a contract is an objective one where the offer was an implied one. For instance, the standing offer of an automobile machine can be accepted by the insertion of the requirement money the entering of a customer into a food canteen and subsequently ordering for a meal.

Also in ***Major Oni v. Communication Associate (Unreported) High Court of Lagos, Lambo Suit No. L.D. 625/71 delivered Jan. 8. 1973***, in the case, the plaintiff made an offer to lease his flat. The defendant replied accepting the offer provided that the air conditioners were fitted per flat. The plaintiff immediately installed the air condition. Despite this, the defendant failed to take up the flats. The plaintiff brought an action for breach of Contract and the court held that there was a valid Contract between them.

In addition, for an offer to be valid, it must be communicated except the offer is an implied one. There are some instances where an offer would not be deemed to exist but an invitation to treat. An invitation to treat is not an offer but a preliminary stage in the making of agreement, where one party seeks to ascertain whether the other party would be willing to enter into a contract and if, so upon what terms?

Example of such is a situation where price tags are put on articles for sale, invitation to tender, auction, adverts, display of goods in stores, supermarkets and pharmaceuticals shops etc.

It worthy of note that an invitation to treat is of no effect in law and can not be regarded as an offer worthy of acceptance.

3.2.1 Characteristics Of Offer

(a) it is a special kind of promise that is conditional upon the offeree making a return promise known as the consideration. It is a definite intention on the part of the Offeror to contract within the Offeree.

(b) It may be made to the whole world. In ***Carlil v. Carbolic Smoke Ball (1892) 2 Q.B. 484***, the defendant company, Carbolic Smoke Ball manufactured a medicine for curing influenza. It advertised it claiming that no one who used the medicine could ever catch influenza again. The company even deposit One Thousand pounds sterling (£1000) in the bank. The plaintiff used the medicine and still caught influenza. He then sued for damages, the court held that since the advertisement was made to the whole world, anyone interested could come forward, accept and performed the condition and that as such, there existed a contract.

(c) An offer must be complete. This means that all the vital terms must be present. For example, A offers B a lease but fails to state the commencement date. That will be an incomplete offer.

(d) An offer must be final. For instances, an offer to sell subject to condition is not a definite promise. /it amounts to encounter offer. However, any efforts made towards the execution of a condition could be regarded as an acceptance as was held in ***Major Oni v. Communications Associations of Nigeria High Court, Lagos, Suit No. L.D/625.71.***

(e) An offer must be objectively clear, that is , must not be vague nor ambiguous.

(f) An offer must be distinguished from an "invitation to treat" An invitation to treat is an assertion of readiness or preparedness to negotiate. The display of goods in shop windows and department stores are mere invitation to treat and not an offer. In Pharmaceutical Society of ***Great Britain v. Boots Cash Chemists (1953) 1 Q.B. 401***, where customers were allow to pick their goods in a self-service chemist shop it was held that there was no contract subsisting between the desk. Also in ***Fisher v. Bell***

(1961) 1 Q.B. 394 where the defendant display a knife in a window shop and was consequently charged with a criminal offence. It was that the display with a price tag was mere invitation to treat and not yet an offer.

See also ***Olaopa v. Obafemi Awolowo University (OAU) (1997) 7 N.W.L.R (pt 354) 204***. Respondents invited Appellant to a meeting to discuss the possibility of developing their land at Ibadan. Appellants were Architects, Designers and Consultants.

Prior to the making of a formal contract, Appellant made the designs and forwarded same to the Respondents with a claim for the feasibility survey fees. Respondent refused to pay and Appellants sued. Court held that there was no contract that could be enforced because the meeting was only an invitation to treat and not an offer. Other examples of invitation to treat are:

a. Advertisement in catalogue as was held in ***Patridge v. Crittenden (1968) 2 E.R. 421*** was regarded as not being an offer by any means though the offeror may call it an offer.
b. Invitation for job interviews
c. Request for tenders
d. Negotiate for sale of land
e. Auction sale. Mere bids do not constitute an offer as was held in ***Payne v. Cave (1989) 3 T.R. 148.***

Offer must be communicated to the offeree that is the acceptor must have knowledge of the offer. A person cannot accept the offer of which he has no knowledge as was held in ***R.v.Clarke (1927) 400 Cr. L. Rep. 277.63.***

3.2.2 Offer or Invitation to Treat?

For an offer to be capable of becoming binding on acceptance, it must be definitely clear and final. If it is merely a preliminary move in negotiations which may lead to a contract, it is not an offer but an invitation to treat. The offeror must not "merely have been feeling his way towards an agreement, not merely initiating negotiations from which an agreement might or might not in time result". As Bowen, L.J., stated in ***Carlill v. Carbolic Smoke Ball Co. (Supra)***, a person making an offer becomes "liable to anyone who, before it is retracted, performs the condition…" whereas by contrast, in invitations to treat,

> …you [the offeror] offer to negotiate, or you issue advertisements that you have got a stock of books to sell, or houses to let, in which case there is no offer to be bound by any contract. Such advertisements are offers to negotiate – offers to receive offers – offers to chaffer…

The important point to note is that an invitation to treat not being an offer, but being a phenomenon preliminary to the offer, is not capable of an acceptance which will result in a contract.

i. Auctions

An auctioneer's request for a bid is not an offer but an invitation to treat. The bid itself is the offer, and acceptance occurs when the auctioneer's hammer falls – Payne v. Cave (1789) 3 Term. Rep. 148. This common law position is confirmed by section 58(2) of the Sale of Goods Act 1893, applicable to all the northern and eastern state of Nigeria as a pre-1900 English statute of general application. In Lagos State, the western states and Edo and Delta States, the applicable laws are the Sale of Goods Law Cap. 125 (1973) for Lagos State; the Western Region Sale of Goods Law Cap 115 (1959) for the western states and the Sale of Goods Law Cap 150 (1976) for Edo and Delta States.

From the above analysis of the auction, it is clear that until the fall of the hammer, any bid may be withdrawn.

It has also been held that an advertisement that an auction sale will be held at a certain venue does not amount an offer to hold it. Thus, an auctioneer is under no liability to anyone who comes to bid for the sale if the sale is cancelled or a particular lot is withdrawn. ***Harris v. Nickerson (1873) 28 L.T. 410 Law, cap. 126, 1973. Laws of Lagos State.***

ii. Display of goods in shelves in a shop, supermarket, self-service shops, etc.

It has been held that the display of goods in the above, and similar instances and situations, constitutes an invitation to treat, not an offer. Thus, it is the customer or client who makes the offer by picking up the objects, or collecting the items in a tray and taking them to the sales clerk. The latter accepts on behalf of the proprietor of the establishment by accepting money from the customer. ***Pharmaceutical Society of Great Britain v. Boots Cash Chemists (1953)1 QB 401; Fisher v. Bell (1961) 1 QB 394; Partridge v. Crittenden (1968) All E.R. 421, D.C.*** It, therefore, follows that before money is accepted, any of the parties to the transaction can refuse to carry on with in, there being as yet no contract and no liability. The classic illustration of the application of this principle is ***Pharmaceutical Society of Great Britain v. Boots Cash Chemists (1953)1 QB 401.***

In that case, the defendants owned a chemist shop organized in accordance with the self-service system. A customer selected a drug with poisons in it which the law required to be sold under the supervision of a chemist. Although the shop had a resident chemist who was authorized to prevent customers from removing dangerous drugs without proper authority, the question arose whether the display of the drugs on the shelves was not an offer, in which case acceptance took place when a customer put the drug in the shopping basket provided by the defendant's

shop. If this was the case then it would be too late to prevent a customer from removing the drug since the contract to buy and sell would have been concluded by the acceptance. The action was brought as a test case to determine whether there had been an acceptance in the above circumstances.

iii. An advertisement of goods in a catalogue ***Grainger & Son v. Gough [1896] A.C. 325***

iv. Invitation To Tender

An invitation to tender is merely an invitation for offers from interested parties and is not itself an offer ***Spencer v. Harding [1870] 5 C.P. 561; 39 L.J.C.P. 332***. Therefore, the highest bid for any goods or property on tender, or the lowest tender in respect of tenders for the construction of buildings may be rejected without any legal consequences. Since the invitation or advertisement is no more than an invitation to treat, the bid or tender is merely an offer which may or may not be accepted by the advertiser. Only on acceptance of the offer by him does a contract come into existence between the parties.

v. Buses, taxis, trains, etc.

The point at which an offer is made in contracts of conveyance between bus owners, railway companies, taxi owners, etc., and passengers remains a continuing source of controversy. Take the bus for instance. Who makes the offer? It is the passenger who waits at the the bus stop, in which case the bus company that makes the offer by stopping at the bus stop, which the passenger

accepts by stepping into the bus? The varieties and possibilities are numerous. In one case it was even stated obiter that by issuing advertisements, a bus company was making offers to intending passengers. ***Wilkie v. London Passenger Transport Board [1947] L.J.R. 864.***

Thus, the passenger's entry into the bus is the acceptance and the offer must have been made to the bus company when its vehicle stopped at the bus stop. The passenger, by waiting at the bus stop, was inviting an offer from the bus company, i.e., he was making an invitation to treat.

3.2.3 Termination Of Offer

An off becomes effective when it is accepted. It has no legal effect unless accepted an offer may be terminated in any of these ways namely:

i. Revocation
ii. Death
iii. Lapse of time
iv. Rejection

(i) By revocation

An offer may be withdraw before it is accepted. this rule is applicable even if he offeror expressly stated that he will keep the offer open for a given period as was decided in ***Dickinson v. Dodd (1876) 2 Ch. D.*** Defendant offered a house for sale 10, the offer was to remain June 12. On June 11 plaintiff heard that the house had been sold to another person. Plaintiff accepted by June 12. It was held that the revocation was effective and that no contract existed.

Also in ***Routledge v. Grant (1826) Bing. 653,*** where G offered to buy R's house and give six weeks period to R to decide. G withdrew offer before the six weeks expired. It was held that he could withdraw the offer at any time before acceptance. For revocation to be effective it must be communicated to the offeree. Mere posting of letter or telegrams is not sufficient. It must be actually received. Furthermore, in ***Byrne v. Tienhoven (1880) 5 C.P.D. 344.*** It was held that the offeror's letter of revocation posted three clear days before the offeree posted his acceptance letter, was ineffective because the revocation letter was not actually received by the offeree.

(ii) By Death

This could be the death of one or both parties before acceptance or of offeree before acceptance or of offeror before acceptance as was held in ***Duff's Executive's case (1886) 32 Ch. D. 301***, where the company offered shares to D, D died before accepting. However, D's executor claimed acceptance. It was held that the offer had lapsed upon Duff's death.

An offer may be constituted by a tender, if the offer relates to a single transaction. Tender nays constitute a definite offer which may be accepted to form a binding contract. However, if it is for the supply of goods and services as and when demanded, then it becomes a standing offer. In the case of a standing offer, there is a separate acceptance and contract each time an order is placed. A standing offer may be revoked at any time excepted in respect of goods and services actually ordered. In ***Percival v. London County Council (1918(87 L.J.K.B. 677***, plaintiff submitted a tender for the supply of goods in such quantities and at such times as defendant should from time to time order. The tenders were accepted but the goods were ordered elsewhere. The court held that there was no contract therefore no beach. A contrast to this case was ***the Great Northern Railway v. Witham (1873) L.R. 9. C.P. 16***. In this case, the plaintiff accepted the tender of the defendant for supply of goods for twelve months "in such quantities as the company may order from time to time." Several orders were made and executed but the defendant refused to execute one. It was held that there was a standing offer to be converted into a series of contracts by the subsequent act of the plaintiff. The plaintiff therefore succeeded in their action for beach.

Where there are cross-offers through letters, there will be no binding contract as was held in ***Tinn v. Hoffmannand Co. (1873) 29 L. T. 271.*** The defendants wrote to the plaintiff on November 28, 1871, offering to sell him 800 tons of iron at 69 shillings per ton. On the same day the plaintiff wrote to the defendants offering to buy 800 tons at 69 shillings per tons. The letters crossed in the post. The plaintiff contended that there was a contract for 800 tons at 69 shillings per ton. It was held that there was no contract. There were merely two simultaneous offers.

(iii) Lapse of Time

An offer stated for a fixed time must be accepted within that time – ***Ramsgate Victoria Hotel v. Monteffiore (1866) L.R. 1 Exch. 109***. An offer made without a fixed time will lapse after a reasonable time. Offer of perishable goods lapses within short time. In the above case, the shares of a company were offered in June but was accepted in November. It was held that the offer had lapsed because the interval was unreasonable.

(iv) Rejection

Rejection of an offer is another way of terminating an offer where an offeree rejects an offer, it becomes terminated. Rejection can also come in an indirect form where an acceptance involves a variation or modification of the original offer. A rejection, however, does not terminate an offer until it is communicated to the offeror. For instance, if Ade makes an offer to Dada and Dada by post rejects the offer if Dada changes his mind, he can still telephone or telegram acceptance after the initial rejection, actual reach the offer or before it takes effect.

Some offers are left 'open' for a specific period of time, in which case it will terminate on a certain date. If there is no time limit stated, then the offer remains open for a 'reasonable period', 'reasonable' being based on the circumstances and subject matter of the contract. Some offers are 'irrevocable' for a certain time period, during which the offeror cannot withdraw the offer until that date. However, in these circumstances, for the offeror's offer to be irrevocable, some consideration (a concept we will later examine) will be paid by the offeree for the privilege of 'tying the offeror's hands so that the offer cannot be withdrawn or offered to someone else. This type of offer is usually referred to as an option.

Having read the various cases so far outlined you should be able to analyse the following general principles:

- parties may change their minds, and withdraw from negotiation before contract has been formed:

- Revocation of an offer by the offeror, subject to the following material in this unit, may be revoked at any time before acceptance by the offeree and it must be communicated to the offeree: ***Byrne V. Van Tien Hoven (1880) 5 C.P.D. 344***

- Personal communication by the offeror to the offeree is not necessary, unlike the need for communication of acceptance by the offeree to the offeror. In other words, revocation can be communicated by a third person provided the offeree is aware of it: ***Dickenson V Dodds (1876) 2 Ch. D. 463***.

SELF ASSESSMENT EXERCISE

i) Musa, an antiques dealer in Wuse, Abuja, displays a Portrait of Queen Amina in his window, marked N20,000. Jennifer walks in and places N20,000 on the counter and asks for the portrait. Musa says, "sorry, Display purposes only, Not for sale". Advise Jennifer. Would your advice be different if Musa were running his shop on a self-service basis and Jennifer placed the vase at the cash register and tendered her N20,000?

ii) Adamu examines an expensive European car in Allen Avenue showroom and asks Billy, the salesman, to hold it for 24 hours while he discusses the purchase with his wife. The next morning, after he has obtained her approval, he leaves for the showroom.

In a traffic jam in Ikeja area, he sees his friend Dare driving the car he was going to buy. Dare says he bought the car the evening before. Adamu rushes to the showroom where Billy confirms the sale. Can Adamu successfully sue him and /or the showroom owner?

4.0 CONCLUSION

In this unit, you learnt about offer. Your attention was drawn to situations and cases that will enable you to decide whether: a particular statement is an offer or an invitation to treat, or whether a communication is a counter-offer or an inquiry. You also learnt about the Postal Rule and exceptions to it. You can now thrill yourself with the implication of telephone calls and E-mail communication for contract formation. Well done. Now we have to move on to consider a very fundamental concept of consideration. Let's go.

5.0 SUMMARY

We must now move away from the complexities of offer and acceptance as it is now time to analyze another fundamental essential element of the contracting process: acceptance. Before then. Note the following additional information.

To say there is a contract means that the parties have voluntarily assumed liabilities with regard to each other. Communications which lack requisite intention are not offers, examples.

- statement of intention: Harris V. Nickerson (1873) L.R. 8 QB 286
- statement which supplies information: Harvey V facey (1893) A.C. 552
- Invitation to treat: Pharmaceutical Society V Boots Cash Chemists (Southern) Ltd. of Great Britain (1952) 2 All E.R 459

- Advert: Partridge v Crittenden (1968) see contrary view in Carlill V Carbolic Smoke Ball Co (1892) 2 QB.
- Request for tenders:Spencer v. Harding (1870) 5 C.P. 561; 39 L.J.C.P 332
- Auctioneers request for bids: Warlow V Harrison (1859) I.E. and E. 309

You remember that we said that an offer must be communicated if it has to be effective. Similarly, if there must be a contract, there must be an acceptance of offer. Acceptance may be words or by conduct. Brogdan V Metropolitan Railway Co (1877) 2 AC 666

Note also that there are exceptions to the rule tha acceptance must be communicated examples:

1) Where offeree waves the requirement of communication: Carlill V Carbolic Smoke Ball (Supra)

2) The postal acceptance Rule: Adams V Lindsell (1818) 1 B & A 681

6.0 TUTOR MARKED ASSIGNMENT

1. State the rules relating to offer and acceptance which apply to \contract made by post.
2. Consideration may be executory or executed, but it must not be past.

Explain this statement with reference to decided cases.

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MODULE 2 FORMATION OF CONTRACT

UNIT 2 ACCEPTANCE

CONTENTS

1.0 INTRODUCTION

An offer is defined as a definite undertaking or promise made by one party with the intention that is shall become binding on the party making it as soon as it is accepted by

the party to whom it is addressed. It is that "acceptance" by the latter that we are presently concerned with. Acceptance may be defined as a final and unqualified expression of assent to the terms of the offer. Any variation or modification of the offer while accepting, or any acceptance which is dubiously expressed will be invalid.

2.0 OBJECTIVES

To understand the essence of acceptance in a contract
When acceptance occur in a contract
To understand the modes of communicating an acceptance between parties to a contract

3.0 MAIN CONTENT

3.1 Acceptance

Yerokun defined acceptance as an indication, expressed on implied by the offered made while the offer remains open and in the manner requested in the offer of the offeree's willingness to be bound unconditionally to a Contract with the offer in terms stated in the offer. Also this is an act which signifies the final consent of the offeree to the terms of the offer.

Acceptance is the final expression of assent to the terms of an offer. Acceptance should be without qualification, equivocation or condition. A conditional assent to the term of an

offer is not an acceptance. In ***Odunfunlade v. Ososami (1972) U.I.L.R. 101***, it was held that an acceptance expressed as "A tentative agreement without engagement" could not result in contract.

Furthermore, an agreement made "subject to contract" is not binding until that contract is made. See ***Maja v. UAC (Unreported) High Court, Lagos Suit No. LD/1426/1970 delivered on September 1973 and UBA v. Tejumola & Sons Ltd. (1988) 2 NWLR (pt 79) p. 662***. However, where it is expressed as "a provisional agreement," it becomes binding at once. In ***Branca v. Cobarro (1947) K.B. 854***, it was held that an offer can only be accepted by the person to whom it is made or by his authorized agent. Where it is made to the public at large any member of the public can be accept as was held in ***Carlill v. Carbolic Smoke Ball (supra).***

3.2 Invalid Type Of Acceptance

There are several situations in which there is an apparent acceptance of an offer but which turns out for varying reasons to be invalid and ineffective. The situations are as disparate in nature as the reasons for invalidity. But it is convenient to treat all these situations under one subsection.

1. **Counter-offer**

A counter offer operates as a rejection of the original offer. In ***Hyde v. Wrench (1840) 3 Beav. 334,*** the defendant offered a car for one thousand pounds sterling £1000 to the plaintiff who replied by a counter offer of nine thousand and fifty (950) sterling pounds. It was held that there was no contract because the counter-offer repudiated the first offer.

For an acceptance to be operative, it must be plain, unequivocal, unconditional and without variance of any sort between it and the offer. The offeree must unreservedly assent to the exact terms proposed by the offeror. In other words, a valid acceptance must be fulfill the following conditions:

a. It must be plain
b. It must be unequivocal
c. It must be unconditional
d. It must be without variance of any sort between it and the offer
e. It must be communicated to the offeror without unreasonable delay.

2. Condition of acceptance

A conditional acceptance is not valid or binding acceptance. Any acceptance which is made subject to a condition cannot create a binding contract until that condition has been met or unfulfilled. For example, if in a negotiation for a lease or sale of land, the agreement is made "subject to contract," the incidence of liability is postponed until a formal document is drawn up and signed. This is a

rule of long-standing and has been regularly applied since the nineteenth century. Thus, in ***Winn v. Bull (1877) 7 Ch. D. 29***, the defendant agreed to take a lease of a house "subject to the preparation and approval of a formal contract." It was held that in the absence of a formal contract the agreement was not binding.

3. Cross Offer

Cross offers occur when two offers, identical in terms, are sent by two parties to each other, by post or by any other means, and the offers "cross" in the post. This is easily illustrated hypothetically. Supposing X, who has been negotiating with Y to buy Y's car for some time, writes to Y, offering to buy the car for N50, 000, and Y, independently and in ignorance of X's intentions writes to X offering to sell his car to Y for N50, 000, and both letters cross in the post. Is there a contract for the sale of Y's car to X for N50, 000? The answer to that is "no". All we have are two identical offers and no acceptance. For a contract to emerge, there must be an offer by one party to the other, and the other, reacting to the offer, indicates his acceptance of it.

4. Acceptance in Ignorance of offer

Can an offer be accepted by someone who was unaware of it? The answer to this question may sound rather trite particularly in the light of judicial opinion about

cross offers. Although the answer to it should be a straight "no", the position was not clear for a long time. The problem arises mainly from the "reward" cases. In Gibbons v. Proctor (1891) L.T. 594, the defendant published a handbill offering a reward of 35 pounds to anyone giving to a Superintendent Penn, information that would lead to the arrest of a person who had assaulted a young girl. The plaintiff supplied the information before the handbill was published and, therefore, in ignorance of the offer of reward. Nevertheless, he was held entitled to the reward.

5. Acceptance of tenders

We have already seen that when the party advertises for tenders from contractors or suppliers, this constitutes an invitation to treat. The tenders from the contractors and suppliers constitute the offer, and acceptance occurs when the advertiser selects one or more of the tenders and communicates this to the supplier or contractor. However, a distinction has been suggested between a tender for the supply of goods up to a maximum number over the same period of time. Thus, Nigerian Army may advertise for tenders for the supply of 50, 000 pairs of boots between January and December 1998, or it may state that it may require "up to 50, 000 pairs of boots" during the same period. It is said that in the first case there is a firm contract for the supply of 50, 000 boots between the Army and the supplier selected, notwithstanding that supply will be by installment over a period of twelve months.

3.3 Communication Of Acceptance

1. Communication

An acceptance may be made by words of mouth or by mere conduct, that is, expressly or impliedly. Acceptance must be communicated to the offeror. The general rule is that acceptance of an offer is not complete until it is communicated by actual notification.

There could be various mode of communications:

a. Where the method is prescribed and the offeree used another method, it is void. See ***Afolabi v. Polymera industries Ltd. (1967) I All NLR 144.***

b. Where no method is stated, the form to be used will depend on the nature of the offer. For example, telephone, telegrams, or prepaid telegram signify urgency. Telegram is effective as soon as it is dropped in the Post Office. Telephone is effective upon the interpersonal conversation on the line.

c. Where acceptance is by post, the rule is that is complete and effective the moment the letter is posted.

In ***Adams v. Linshell (1818) I B. & Ald. 681***, the plaintiff was offered some consignment of wool to purchase. He accepted by replying that full acceptance is in the "course of

post". The defendant sold the wool to another buyer and the plaintiff sued. It was held that an offer is made when it actually reached the offeree. In actual fact, acceptance would take effect as soon as the letter was posted.

Acceptance must be by way of positive conduct, mere mental acceptance is not sufficient while silence is no acceptance as was held in ***Felthouse v. Bindley (1862) II C.B. (N.S.) 869***. Plaintiff offered to buy a horse from defendant. Plaintiff assumed that if he did not hear from defendant, the horse was his already. The horse in fact was with an auctioneer who later sold it to another person. It was held that no contract existed as acceptance had not been communicated.

2. The Moment of Acceptance

At what point in time does acceptance occur in each case? Much light has been thrown on this on this issue of Lord Denning in ***Entores v. Miles Far East Corporation (1955) 2 QB 327, C.A.*** In that case an offer was made by telex in London to the defendant in Amsterdam and the defendants replied by telex. When a dispute arose, the plaintiffs brought an action in England and the defendants challenged the jurisdiction of the English court. The question of jurisdiction devolved on where acceptance actually took place.

3. Where method of acceptance is prescribed

An offeror may or may not prescribe the mode of acceptance. Uwaifo, J.C.A., put it succinctly when he said:

> ***It is the law that an offeror may prescribe and direct the method by which an acceptance of an offer may be communicated. Whether some particular mode has been proposed, depends upon the inference to be drawn from the circumstance. Anno Lodge Hotels v. Mercantile Bank, (1993) 3 NWLR (pt. 248) 721 at 730.***

Where he states how the acceptance of his offer is to be communicated, the question arises whether precise observance is mandatory. Can the offeree send his acceptance by messenger when required by the offeror to do so by post? It is safe to say that any mode either as fast or faster that prescribed by the offeror is sufficient to create contract. Thus, in ***Turnn v. Hofmann & Co. (1873) 29 L.T. 271,*** acceptance was requested by return post. Honeyman, J., observed in his dissenting judgment that "that does not mean exclusively a reply by letter by return post, but that you may reply by telegram or by verbal massage or by any means not later than a letter written by return of post" ***(1893) 29 L.T. 271***

4. Method of acceptance – not prescribed

Where no form of communication of acceptance is prescribed by the offeror, the form to be adopted by the offeree will depend upon the nature of the offer and the surrounding circumstances. Thus, an oral offer implies an oral acceptance. If the offer is by telegram, fax or e-mail then a prompt reply is indicated and it too should be by telegram, fax or e-mail. In most cases, acceptance does not occur until received by the offeror. The only exception is acceptance by post. This mode of acceptance will now be considered separately.

5. Acceptance by Post

Acceptance by post is a third exception to the rule that acceptance must be communicated. In regard to acceptance by post, acceptance takes place contract takes effects the moment a letter of acceptance is posted. So, where acceptance by post is requested or it is appropriate as a reasonable means of communication, acceptance is complete immediately the letter of acceptance is posted, even where it was delayed, destroyed or lost in the post that it never reached the offeror.

This rule was laid down by Lord Ellensborough in 1818 in the famous case of ***Adams v. Lindsell (1818) I B & A 681***. In this case, by a letter dated September 2, 181, the defendants offered to sell some quantity of wool to the plaintiff, and required a reply by post. The defendants misdirected their letter and did not reach the plaintiffs until the evening of 5th September. The same night, the plaintiff posted a letter of acceptance, which reached the defendants on September 9. If the letter had been properly directed, the answer ought to have been received on September 7. Meanwhile, on September 8, not having received a reply, they sold the wool to

another person. The plaintiff sued for breach of contract. It was argued that there was no contract until the letter of acceptance was actually received, and at that time, the wool had been sold to a third party. The court held that a contract comes to existence when the letter of acceptance is posted. In this case, the contract comes into existence on September 5 and the defendants committed a breach of contract by selling the wool on September 8. It seems the rule applies to communication of acceptance by cable or inland telex messages, but not instance modes such as telephone, telex or fax machines.

Thus, in ***Household Fire Insurance Co. v. Grant (1879) 4 Ex. D 216***, the defendant applied for shares in the defendant company and the company posted a reply accepting the offer that a number of shares were allotted to him. The letter was lost in post. Subsequently, when the company went into liquidation the defendant who was up to then was not aware that he was a shareholder in the company but was allotted some shares and suddenly was called upon to pay for his shares into the company, the action was resisted. The court held that he was liable to pay for the shares. The contract was formed the moment the company posted the letter. Some justifications have been advanced for postal rule as constituting acceptance. It is essentially a rule of convenience and is usually justified on the grounds that if the offeror chooses the post as a means of communication, he must accept the inherent risks, and it is not

important he does not received the letter of allotment. Other reasons given by the court are:

i. the post office is the common agent of both parties and any letter put in the post is technically acceptance communicated to the offeror;
ii. with the posting, a contract is complete.
iii. An offeror is free to stipulate the means of communication of the terms of his offer.
iv. The rule is most convenient of all possible alternatives. However, the postal rule will not apply.
    a. where the letter of acceptance has been properly posted. In ***Re London and Northern Bank (1900) I Ch. 220***, the letter of acceptance was handed to a postman, who took it to a district office to post and was delivered after the letter of withdrawal had been written.

    b. Where the letter is not properly addressed: This appears to be further that it must lead to misdirection. In this instance, letter not properly addressed may be misdirected to someone else not to the offeror. It will not be fair to say that a letter of acceptance sent by post and wrongly addressed by the offer should fall within the postal rule.

    c. Where the express terms of the offer exclude the postal rule see ***Holwell Securities v. Hughes (1974) 1 WLR 154, 157.***

    d. Where it is unreasonable to use the post. For instance to reply by second-class post to a verbal or cabled offer.

The rule in ***Adams v. Lindsell (1818) 1 B & Aid. 681*** is obviously arbitrary and this could unjust as well. This was manifestly clear in ***Household Fire Insurance v. Grant (1879) 4 Ex. D 216 (1874 – 1880) All ER 919***. As was rightly stated the post office is just a carrier of mail nothing else. It cannot be regarded in the law of agency as an agent of parties. It is just a middle way or device for providing a service. It knows nothing of the bargain of the parties.

3.4 Revocation Of Acceptance

Acceptance is the final act in the conclusion of an agreement between an offeror and offeree. As a matter of principle, acceptance once made cannot be revoked especially in the case of face to face contract. However, it is not simple in the case of acceptance made by post but it seems certain that an offeree can withdraw his postal acceptance by a faster means. The position of the law seemed to have changed. It may now be possible to recover postal letters before they are delivered. Therefore acceptance by post will only be effective when delivered as was held by the United States Courts in ***Rhode Island Co. v. U.S. F. Supp. 417 (1955).*** Plaintiff offered to supply bolts to the defendants who had accepted by post. Plaintiff later discovered that they had miscalculated and under quoted

thus short-changing themselves. They withdrew the offer by telegram before the letter was delivered. It was held that the offer had been validly withdrawn before acceptance. See also ***Dick v. Us. F. Supp. 326 (1949).***

4.0 CONCLUSION

In this unit, you learnt about acceptance. Your attention was drawn to situation and cases that will enable you to decide whether: a particular statement is offer or invitation to treat, or whether a communication is a counter offer or an inquiry. You also learnt about the Postal Rule and exceptions to it. You can now thrill yourself with the implication of telephone calls and E-mail communication for contract formation. Well done. Now we have to move on to consider a very fundamental concept of consideration. Let's go.

5.0 SUMMARY

We must now move away from the complexities of acceptance as it is now time to analyse another fundamental essential element of the contracting process Consideration

6.0 TUTOR MARKED ASSIGNMENT

1. State the rules relating to offer and acceptance which apply to contract made by post.
2. Consideration may be executory or executed, but it must not be past.

Explain this statement with reference to decided cases.

7.0 REFERENCES/FURTHER READINGS

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MODULE 2 FORMATION OF CONTRACT

UNIT 3 Consideration

CONTENTS

4.0 Conclusion
5.0 Summary
6.0 Tutor Marked Assignment
7.0 References/Further Readings

1.0 INTRODUCTION

A Contract is a bargain and except it is under seal, it must contain element of ***quid quo pro*** (meaning something in return for something else) this element of bargain is a valuable consideration and the principle factor that guides the court in deciding whether there is mutuality of exchange, which is legally enforceable. Consideration gives to a bargain the "badge of enforceability . It is therefore a concept of utmost importance in the study of law of contract.

2.0 OBJECTIVES

When you shall have read this unit, you should be able to:

• Define the term "Consideration"

• Demonstrate a good knowledge of the element of the concept and significance of consideration

• State the types/classes of consideration

• Distinguish past consideration

3.0 MAIN CONTENT

3.1 Meaning Of Consideration

Consideration is very essential in the formation of any contract. It is ***"quid quo pro"*** meaning "something for something" thus conveying an idea of reciprocal interaction. In any contract there must be mutual promises each of the promises consisting a consideration for the other. A promise cannot be a consideration for another promise unless it is either a detriment to the plaintiff or a benefit to the defendant as was held in ***Currie v. Misa (1875) L.R. 10 Ex. 153***. The contract is, therefore, concluded as soon as the promises have been exchanged.

Consideration is the price at which the defendant's promise is bought. Therefore the plaintiff who is suing on a promise made by the defendant must show or prove that he himself has paid a price, that is, he gave something in return. As a general rule, once a party has given reliable consideration, he can enforce the contract. There are, however, some exceptions to the rule:

a. Where the plaintiff is under a public duty imposed by law
b. Where the plaintiff is bound by an existing contractual duty to the defendant; and,

c. The rule in ***Pinnel's Case (1602) 5 Co. Rep. 117(a)*** dealing with non-furnishing of consideration in a transaction that makes part payment of a debt a full settlement of the debt.

3.2 Types Of Consideration

Consideration may be executed or exe3cutory. Consideration is executed where one party performs as act in fulfillment of a promise made by the other.

The examples of reward cases are instance, in a unilateral contracts, Ade offers a reward of N100, 000 to anyone who provides certain information or that he will walk from Ibadan to Maiduguri or if he finds a lost dog, or if he produces the killer of Minister assassinated. In order words, one person promises to pay the other a sum of money if the other will do or forebear to do something without making promise.

Consideration is executor where there is an exchange of promises to perform acts in the future. For instance, in a bilateral contract, Ade promises to deliver goods to Bunus at a future date and Bunus promises to pay on delivery. Executory consideration happens quite often in commercial transaction where delivery and payment are to be made in future. Both parties become bound prior to contract performances. In executor contract, the exchange of promises that constitutes the contract as the whole transactions is in future.

However, in executed contract as illustrated by reward cases, the finder of these goods is taken to have accepted the offer as well as furnish considerations by the single act

returning the goods to the offeror. In this case; liability is outstanding on the side of the offeror.

3.3 Rules Governing Consideration

1. ***Consideration must be sufficient but need not to adequate:*** This means that there is no need for a counter promise to be equal to or near that of the promise of the other party. Sufficiency means something that is real and of value although an insufficient consideration cannot support a contract. Consideration will not be sufficient if it is vague and incapable of performance, illegal or merely "good" for example, out of natural love and affection. In ***Stilk v. Myrick (1809) 2 Camp. 319,*** the captain of a ship promised his crew the wages of two of the deserters. The captain did not fulfill his promise and the crew sued. It was held that there was no consideration bt the crew as they were already contractually bound to do such extra job. Similarly, in ***Thomas (1842) 2 Q.B. 851*** where a woman paid one pound sterling to her husband's executors as rent in fulfillment of her husband's wish, it was held that the amount was sufficient a consideration, its inadequacy notwithstanding.

2. ***Consideration must not be illegal, immoral, or contrary to public policy:***

Illegality

Abayomi promises Babalade N1000 in consideration of Babalade killing Abayomi's enemy, that is, Christopher. Babalade kills Christopher and then sues Abayomi for the money. Babalade's action will fail because the consideration he gave was illegal. See the case of ***Chief A.N. Onyuike v. G.E. Okeke (1976) All NLR 148*** where there was a contract in which the price of the goods that was delivered to the defendant was to have been paid in the currency of the Republic of Biafra which the Federal Government of Nigeria had declared as an illegal rebel enclave.

Immorality

Achuka agrees to have illicit sexual intercourse with Bareta who promises to pay her N20 in return. Achuka does her part of the agreement and sues Bareta for the N20. Ahuka's action will fail because the consideration she gave was sexually immoral.

Public Policy

Shehu promises to pay N5000 to Babayaro if Babayaro will influence Justice Alhaji to dismiss a criminal case pending before Justice Alhaji. Babayaro performs his part and sues Shehu for the money. The action will fail because Babayaro's consideration for Shehu's promise is contrary to public policy.

4. ***Consideration must move from the promisee to the promisor:*** The promisee is the person to whom the promise has been made. The general rule is that the plaintiff who is suing for a breach of contract must show that it is he who has

offered consideration. For instance, where Ade says to Bayo, "I will put N5000 in your business which is being presently run at loss if Ayo does the same." Ayo provided N5000 and Ade fails. Bayo cannot successfully sue Ade because the consideration has not moved from Bayo but from Ayo. Also Bayo but to Ayo.

In ***Tweddle v. Akinson (1861) I B & S 393***, T's father and a would be father-in-law. William Guy agreed between themselves respectively to pay T 1000 pounds sterling and 200 pounds sterling on his marriage. The marriage took place but William Guy did not pay 200 pound sterling and later died. T then sued Guy's executors for the amount. It was held that his action must fail because he did not give consideration.

4. ***Consideration must be executory, executed but must not past:***

i. Executory Consideration

Consideration is executory when the consists of a promise for another promise to be performed in the future. Examples include an engagement to marry and agreement for sale of goods on credit. It is essentially bilateral in form. For instance, where John promises to deliver goods tomorrow and James promises to pay upon delivery, the consideration of both parties is executor.

ii. Executed Consideration

This happens when the bargain consists of a promise in return for an act in which case the contract is concluded when the offeree has concluded the act. Here there is only one promise to be enforced and the consideration is said to be executed. This type of contract is said to be unilateral since the liability is outstanding on only one side. Such promises are for future performances. John promised to marry Jane, Jane promised to run the offer of a reward for a lost dog, the return of the dog by the finder is the consideration which is executed leaving the offeror to fulfill his own promise. Finally, John receives N10, 000.00 from James in exchange for which James promised to deliver the goods ordered and paid for by tomorrow. James consideration is executed while John's consideration is executor.

iii. Past Consideration

If a party makes a promise to another because that party has in the past performed some service for him, the past act and the new promise are two separated transactions and not a consideration as such; consequently, the past services is called past consideration and it is not an enforceable consideration. The general rule is that past consideration is no consideration at all. See further, the following cases: ***Re-McArdle (1951) Ch. 669, and U.T.C. Ltd. V. Hauri (1946) 6 WACA 148,*** dealing with promise of employee not to work for rival or former employer. Moreover, in ***Roscorla v. Thomas (1842) 3 Q.B. 234***, a Horse was bought and paid for. The buyer asked whether it was free from vice or not. The horse was vicious and plaintiff sued. It was a past consideration and thus unenforceable.

In ***Re-McArdle (supra)***, children were entitled to inheritance of house after their mother's death. One of them and his wife lived with their mother in her life time. His wife spent money on some improvements on the building. Later all the children agreed in writing to pay the wife £488 for the improvement, it was held that the consideration was past and not binding.

However, past consideration may be valid under the following circumstances:

i. Where the past act was ordered by the promisor,
ii. It must have been understood that payment would be made for the services rendered; and
iii. Where there is promissory estoppels
iv. Statutory exception under section 27 of the Bills of Exchange Act which states that valuable consideration may be constituted by an antecedent debt or liability.

SELF ASSESSMENT EXERCISE 2

1. Past consideration is not consideration. Discuss with references to decided cases
2. Discuss the rules governing to consideration.

3.5. Critique Of Performance Of Existing Duties

There can be no consideration when a person promises to perform what is an existing public duty or obligation, although the courts are notalways consistent on this point: ***Ward V Byham (1857) 1 WLR 496***. There, Byham's promise to pay support for his lover's illegitimate child was upheld even though he had an obligation at law (under the English National Assistance Act, 1948) to do so; the promise he made was consideration, and furthermore, the mother had promised that in return for the allowance she would look after the child.

Consideration can also be found in a promise to perform a duty which is already owed under a contract to the same promisee. If B is already contracted to perform something for A, and A promises something more if B will perform that promise or repeat the promise, then the price for As further promise is B's promise or performance of an act B was already obliged to do. However, some of the older cases conflict on this point: ***Hartley V Ponsonby (1857) 7 E & B 872***. In this case, the captain of a ship promised its crew members additional wages to sail home as the vessel was undermanned as the result of deserters who 'jumped ship'. This promise was upheld as the seamen had 'gone beyond the call of duty' by manning an unseaworthy ship. In ***Stilk V Myrick (1809) 2 Camp. 317*** in not dissimilar circumstances, the captain promised to divide the deserters' wages among those who remained on board to sail home. Here the promise was not held enforceable as there was no consideration: the remaining crew members were merely performing what they were obliged to do.

SELF ASSESSMENT EXERCISE

Distinguish between a 'promise' and 'performance' of a promise by reference to decided cases. But if A sells a car to B and after the transaction is complete, A promises B to replace the tyres with new ones, then B cannot successfully sue A for breaking the promise. A's second promise is not part of the original bargain. Note that the rule regarding past consideration is not applicable to holders for value of cheques and bills of exchange, an important aspect of commercial law which is not examined in this course.

2. Distinguish the followings cases
   1) Stilk V Myrick (1809) 2 Camp. 317
   2) Hartley V Ponsonby (1857) 7 E & B 872

3.6 New Approaches To Consideration

Although these underlying principles of consideration remain at the essence of the law of contract and have been tested over the years by judicial precedent, you will appreciate from ***Stilk V Myrick (supra)*** that the law is not necessarily as consistent as an idealist would like. One of these principles is that the parties to a contract must be

under some obligation to pay and perform (consideration), and in some cases endorse what appears to be a 'bending of the rules'. To illustrate this, we give one example the case of ***Central Property Trust Ltd. V. High Trees House Ltd (1947) KB 130 at 134***. Study this case carefully and you will see that, it challenge the more conventional approach to consideration. In so doing, it may ultimately have widespread application in the conduct of some business situations.

In Williams V. Roffey Bros and Nicholls (Contractors), Williams, the sub-contracting carpenter on a block of flats being built by Roffey Bros., convinced them that they should pay him an additional sum of money for work he was already obliged to carry out. Williams was in financial difficulty but significantly, Roffey Bros. faced a penalty if they did not complete the project on time. This was crucial to the Court of Appeal's decision to order the contractor to pay Williams the additional money when they refused to do so. In other words, it was a benefit to Roffey Bros. to have the contract completed on time.

Also significant to this ruling is the fact that the court could find no evidence of economic duress or fraud in the parties' business dealings. Therefore consideration was established by the benefit received by Roffey Bros. in meeting their contractual obligations and thereby avoiding a financial penalty. This was balanced by their promise to pay Williams an additional sum to complete his work on time.We now turn to an interesting example of how a well-established common law principle – in this case, consideration – can be modified by

equity and create something known as 'promissory estoppel'. We have covered this particular topic in some detail as it will provide you with some insight into how our law develops over the years.

3.7 Common Law And Equity: Accord And Satisfaction

Carefully consider the judges' ruling in the Williams case before you examine the High Tree case which we referred to earlier. Consider this well-established common law concept: that the payment of a smaller sum for a larger debt does not amount to a discharge of the difference

between what was paid and the amount still owing. Read ***Pinnel's case (1602), 5 Co. Rep. 117a*** which outlines this concept. Pinnel sued a man called Coe for what amounts to about $1,000 at present exchange rates, due on November 11, 1600. Coe fought the case on the grounds that Pinnel had accepted $650 as 'full payment' of the debt on October 1. Although Pinnel succeeded on a technicality, the case established two principles:

i) Payment of a lesser sum (for a larger amount) on the date it is due does not discharge the debtor's obligation to pay the full amount.

ii) Payment at the creditor's request of a lesser amount before the due date is good consideration for the creditor's promise to receive early payment (though less than he/she is due) as this is a benefit to him/her balanced against the corresponding detriment of the debtor to pay earlier than he/she was obliged. Although the first principle above was criticized (at least one reason being that it was not entirely fair to the debtor), the House of Lords approved it in ***Foakes V Beer, (1884) 9 App. Cas. 605***. Accordingly the common law doctrine via Pinnel's Case of 'accord and satisfaction' established the following: if A owes B N1, 000 and B agrees to discharge A's obligation by accepting N650 then A must:

a) obtain the agreement ('accord') of B;

b) provide B with some consideration ('satisfaction') for relinquishing his/her right to full payment of N1,000, unless such a release is under seal. In practical terms, as the years passed, the application of the somewhat inflexible rule of Pinnel's Case meant that it could be relaxed on certain occasions:

- When debtor and creditor are disputing the sum owed: if the creditor accepts a lesser amount, then the debt is discharged.

- When the manner or terms of payment are changed from the original obligation by way of 'substituted performance'; say,payment of a pen for a monetary debt or payment of a Nigeria Naira loan. The rational here is that it may be difficult to assess the true value of what is being given in substituted performance for the original debt.

- Paying a smaller amount before the larger amount is due (the second 'arm' in Pinnel's Case).

- Where several creditors agree that their collective debt could be paid off on the basis of, say, 60 kobo in the N1.00, this is good discharge. Although clearly, payment of a smaller sum, the consideration is the joint agreement between creditors and debtor

the former will not exercise their full rights to recover the debt.

- Payment of a smaller debt by a third party (not the debtor) is a good discharge: ***Welby V. Drake (1825) 1 C. & P. 557 N.P***.A final comment on 'substituted performance': In ***Goddard V. O' Brien (1882) QBD 37*** the court had ruled that payment by cheque (as distinct from cash) for a lesser amount was a good discharge of the debt (possibly because not everyone had a bank account in those days). This was generally accepted as the law until 1965 when Lord Denning declared in ***D & C Builders Ltd V. Ress, (1965) All ER 837*** There the plaintiffs did some renovation and reconstruction work for the defendants. The agreed fee was 482 pounds. After completion of the work, and fully aware that the plaintiffs were desperate for funds, the defendants offered to pay 300 pounds in full discharge of the debt, or nothing. In desperation, the plaintiffs were desperate for funds, the defendants offered to pay 300 pounds in full discharge of the debt, or nothing. In desperation, the plaintiffs accepted. The defendants paid by cheque,

and as soon as they cashed it, the plaintiffs brought an action to recover the balance of 182 pounds. The defendants relied on earlier decisions that payment of a smaller sum by a negotiable instrument in discharge of a larger sum was a valid exception to the rule in Pinnel's case. The court dismissed this argument and held the defendants laible to pay the balance of the debt.

4.0 CONCLUSION

In this unit you have considered a fundamental element of contract – consideration. We have demonstrated its essential elements and significance, certain important decided case have been indicated to guide you as to what behavior the courts are likely to accept or refuse as valid consideration. The incidence of past consideration has also been alluded to, the importance of which cannot be sufficiently stressed. You will be better of if you read it again before you proceed further. You are advised to attempt the self Assessment Exercises and Tutor marked Assignment.

5.0 SUMMARY

Consideration in its widest sense is the reason, motive, or inducement by which a man is moved to bind himself by an agreement. It is not for nothing that he consents to impose an obligation upon himself or to abandon or transfer a right. It is in consideration if such and such a fact that he agrees to bear new burdens or to forgo the benefits which the law already allows him. The concern of the law is that each party to a contract obtains what he/she bargained for. Consideration may be positive or negative, executory or executed. It must be valuable, sufficient. Real and genuine, lawful, and must not be past.

6.0 TUTOR MARKED ASSIGNMENT

1) Distinguish between a "promise" and "performance" of a promise by reference to decided case

2) Explain the term promissory estoppel

3) Distinguish Executed and Executory consideration

4) Is past Consideration a consideration in Law? Explain

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MODULE 2 FORMATION OF CONTRACT

UNIT 4 INTENTION TO CREATE LEGAL RELATIONS

CONTENT

1.0 INTRODUCTION

Intention to enter into legal relation is essential in the formation of a valid contract. The general rule is that a contract, which is duly formed with valuable consideration, will not be enforced unless there is an intention by the parties to be legally bound. The intention to create legal relation is a necessary independent element in the formation of contract and it is essential in all contracts.

It means the readiness of each to accept the legal consequences if he does not perform his own part of the contract. An offer to be made binding by acceptance, must be one which can reasonably be regarded as having been made in contemplation of legal consequences.

2.0 OBJECTIVES

- You should be able to have an understanding of what an intention to create legal relations
- Should be able to explain when there is an intention to create legal relations or not between parties
- Illustrate the most important factors in determining wether or not an intention to create legal relations

3.0 MAIN CONTENT

3.1 Intention To Create Legal Relations

When there is no intention to create legal relations there would be no binding contract at law. This situation is common in the areas of simple contracts that are oral or even when they are in writing. In order to ascertain as to whether there is an intention to create legal relation or not, the Courts have evolved certain guidelines. For instance, where an agreement is of a domestic nature, the courts are prone to assuming, on the face value of it, that there is no intention to create legal relations. On the other hand, where the agreement is of a commercial nature, there is a presumption by the court that the parties intent to create legal relations and the burden of rebutting that presumption is on the parties. Statutory provisions may also act as bar o the enforceability of an agreement. For instance, an engagement to marry may not be an intention to create legal relations.

In ***Balfour v. Balfour (1919) 2 K.B. 571***, a civil servant who was on overseas posting in Ceylon agreed to be sending down subsistence allowance £30 to his wife every month. Later on, they got separated. The husband did not fulfill his promise, the wife sued her husband for unpaid allowance after both of them had separated. It was held that the arrangement was purely a domestic agreement and that the parties did not intend to create

any binding legal relations. However, in ***Merrit v. Merrit (1970) 2 AER 760*** where a husband deserted his wife and agreed to pay her allowance per month and also transferred the title of the house to her name but failed to keep the promise, the Court of Appeal held that the promises were intended to have legal effects.

As for commercial agreements, in ***Jones v. Venron's Pools Ltd (1938) 4 UILR 131*** the plaintiff played pools and won. The coupon contained a clause which stated the "the transaction should not give rise to any legal relationship"… or be legally enforceable… but binding in honour only. Plaintiff sued the company to claim his winnings. It was held that the exclusion clause on the coupon was a limitation to any successful legal action. See also ***Atu v. Face to Face Pools Ltd (1974) 4 UILR. 131***. Similarity, in ***Amadi v. Pools House Group and Nigeria Pools Co (1966) 2 All NLR 532***, the plaintiff staked pools upon which coupon it was written that the relationship will be "binding in honour only" and that it shall not give rise to any legal relationship nor be the subject of litigation. The Court held that from the circumstances, the contract, though of a commercial nature was not intended to be legally binding.

IF A and B agrees to enter into a carton to eat together, a promising to pay for the soft drinks and B promising to pay for the rice and chicken bills, there is a bargain, (agreement plus consideration) but legal obligation are not created.

In ***Weekes v. Tybald (1605) Noy. 11***. In the case, defendant in a conversation with plaintiff said he would give E 100 to anyone who marries his daughter with his consent. Plaintiff fulfilled this condition but defendant refused to pay him E 100.

He sued. The court held that is not reasonable that the defendant should be bound by general words spoken to excite suitors. This decision was reached based on the fact that an intention to enter in to legal relations was not present. This not all agreements are binding because in some cases there is the absence of an intention to create legal relations. Also in determing whether or not such intention exists, the courts have often conveniently classified agreement into the three categories namely:

i. Social and domestic agreement
ii. Commercial agreement
iii. Collective agreement.

3.2 Social and Domestic Agreement

It is very obvious that most social and domestic agreement do not amount to binding contracts. This is because most times it is clear from the nature of such agreement that there was no intention to enter into a binding contract. For instance, if B said to A is hostel mate that, help me fetch water, I will give you plate of rice this is "Prima Facie" not contract that is capable enforceable in the eyes of the law.

Similarly, agreement between husband and wife are mostly to be devoid of any contractual intention. In the case of ***Balfour v. Balfour (1919) 2 KB 577***. In the case, the defendant came to England (on doctor's advice) while promising to pay her £30 a month for the duration of her stay there. He defaulted in payment of the amount. She sued. Her action failed on the ground that the parties had no intention of creating a legally binding agreement.

In ***Merit v. Merit (1970) WIR 211***, it was shown that some agreement husband and wife can from time to time produce legally binding consequences. In this case, the court of Appeal held that there was an intention to create a legally binding relationship between the husband and wife.

Social agreement between friends do not usually amount to an enforceable contract because parties do not intend to bound by such agreement.

For instance, if A, B, C and D agrees to be fueling E's car and returned E give them a rid. If E than decided not to give them a rid again they cannot sue E to enforce the agreement.

3.3 Commercial Agreement

There is a strong presumption of contractual intention in commercial agreements. This presumption may generally be rebutted express or implied words. Thus, in ***Rose and Frank & Co. v. Gompton Bross (1923) 2 KB 261***, the parties provided that a sole agency agreement should not be subjected to legal jurisdiction in the courts.

The House of lords stated that the clear words used rebutted the presumption of legal consequence.

However, in commercial agreement there are two instances stand out where defendant have been advanced the plea of absence of contractual intention.

These are:

i. Mere puffs

This is where the parties assert that the promise was a mere puff in such a situation, it is the test of a reasonable man that is applied to determine whether the promise is a mere puff or not.

For instance, advertisement which claims that Cadbury Bournvital will make the drinker the faster runner in the world or those who use respondent toothpaste will became a successful business person. Such claims are mere puffs.

ii. Agreement contains a clause that expressly excludes contractual intention. The most common example is to be found in football poll agreement stakers and the pools companies.

There is always a clause in football coupons states:
"It is a basic conditions of the sending in and acceptance of every coupon, that it is intended and agreed that the conduct of the pools and everything done in connection there with and all arrangements relating there to shall not be attended by or give to any legal relation enforceable, or the subjected litigation, but all are binding in honour only".

In ***Amadi v. Pool House Group and Nigeria Co. (1966) 2 All NLR 254.*** Plaintiff stakes the sum of E1.16S in a football poll and claimed that on the basis of his correct entry he had won E50, 009.12S. The second defendant claimed that the plaintiff upon was never received even though they were their agent and disclaim liability in reliance on the honour clause above. The judge held that the "honour clause" operated to exclude any contractual liability. The rationale is given that by the nature of football agreement, if the pools companies were liable to defend themselves in court at the insistence of every stakeholder who though he had won, pandemonium would result pools business cannot be carried on for a day on terms of that kinds.

The intention was to ensure that the relationship between the parties was to be that of "honour", in other words, a create a legal relationship.

3.4 Collective Agreements

This is an agreement between a trade union and an employer regulating rates of pay and condition of work. It seems that at common law, there is a presumption that the parties do not intend to enter in to legal relation unless it is clearly established that the parties intended a binding contract. The general view is that such collective agreements were prima facie not intended to be legally binding as between trade union and employers.

The position at common law rebutted by statute, thus, section 13 and 15 of wages Boards and industrial council Act 1973, provide that a wages agreements is binding on the employers and works to whom they relate on the order of the master of labour.

Similarly, in section 2(3) of the Trade Dispute Act, 1976, a collective agreement deposited with the minister of labour becomes binding on the employers and workers whom they relate once the minster makes the appropriate order in this situation, a collective agreement is presumed not to have been intended by the parties to be legally enforceable contract unless it is in writing and expressly provides to the contrary.

4.0 CONCLUSION

Where it is found that the intention was present, then, of cours, the agreement would be actionable, but where the finding is negative, i.e., that there was no intention, the agreement would not be actionable; the existence of a contract is negated.

The greatest exponent of the school of thought that intention to enter into legal relations is irrelevant to the formation of a contract is Professor Williston. /His vies may be summarized in this well-known passage:

> ***…the common law does not require any positive intention to create a legal obligation as an element of contract… A debliberate promise seriously made is enforced irrespective of the promisor's views regarding his legal liability. Williston on Contracts (3rd Ed.) p21.***

5.0 SUMMARY

Ultimately, the question of contractual intention is one of fact. The agreement in question must be carefully scrutinised to determine the nature of the parties' agreement.
Without an intention to create legal relations, there will not be a contract.

6.0 TUTOR-MARKED ASSIGNMENT

1. To what extent are courts examining whether or not the parties intend to take any dispute to a court for resolution? To what extent are the courts determining whether or not the agreement has certain terms?
2. Are courts influenced by the reliance of one party upon the promise of another in determining that a contractual intention is present?

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MODULE 3 CAPACITY TO CONTRACT

Unit 1 Contract made by Infant
Unit 2 Contract made by Illiterate Persons
Unit 3 The capacity of Corporations
Unit 4 Contract made by Mental persons and Drunken persons

UNIT 1 Capacity to Contract

CONTENTS

1.0 INTRODUCTION

Under the Nigerian Law, an infant is someone below the age of 18 years and therefore cannot enter into a valid contract. Customary law regards the attainment of the age of puberty as the stage of capacity for infants. This, however, varies between boys and girls as was held in ***Labinjoh v. Abake (1924) 5 NLR 33***. In this case, plaintiff an adult trader sued a girl of 18 years for the sum of £50 being the balance of goods sold to the defendant who claimed she was an infant and that the contract was void. Plaintiff maintained that the age of majority in Nigeria was the age of puberty and not 21 years. The court held that the age of majority in Nigeria is 21, hence the adult trader could not recover her money. Moreover, the following categories of contracts are not enforceable against such infants under the Infants Relief Act (England) 1874.

2.0 OBJECTIVES

- meaning of capacity
- the essence of capacity in a contract
- the effect of lack of capacity in a contract

3.0 MAIN CONTENT

3.1 Essence Of The Law Of Contract

The fundamental principle of law of contract had be said to be ensure peace, order and security as well as the smooth and efficient or commerce, industry and economy. This is because the law takes congnisance of the need for the satisfaction of reasonable and well founded expectation created by promises and agreement. The legal relations brought about by the law of contracts, enable someone to whom service, goods, money or some other benefits has been promised to enforce the promise or obtain remedy for its breach.

Accordingly, since we all engage in the activity of contracting, the law of contract is all an important one. The aim of the law of contract is not only to maintain order but also promote justice in every day by day contract. Justice in this context involves the balancing of the interests of all the parties to the contractual obligation.

Similarly, law of contract seeks to provide appropriate remedies where a party has suffered injury due to the action or inaction of the other. For example, the provide a civilized method of obtaining remedy where there is a breach of contract in any aspect of law of law contract. The remedy of a breach of contract may be damages, specific performance, injunction rescission, indemnity. It depends on the fact and circumstances of each cases. However, it should be noted that, in law of contract some rules are developed in other to ensure that a group of people are not exploited or defraud in a contractual relationship because of their status. These group includes; companies, illiterates, infant etc.

In concluding, law of contract aims at promoting trade and commerce within a particular society.

3.2 Infants

The power of an infant to enter into a contract is governed by rules of common law as limited by statute. At common law, an infant is a person who has not attained the age of maturity, 18 in some jurisdiction, but 21 years in Nigeria. Under the infant law, and Uniform Law ***Cap. 49 Laws of Western Nigeria 1959*** an infant means a person under 21 years of age. However, under the customary and Islamic law, the contractual capacity of an infant depends on his physical capacity and maturity. Thus, in ***Labinjo v. Abake 5 NLR 33*** the court stated that the contractual capacity begins at puberty. In ***Folata v.***

Dowoma (1970) NWLR 105. It was held under Muslim law that maturity is determined by physical maturity or a declaration of the youth in question or failing this, by reaching the age of 15 lunar months in the case, a youth sold a family house-

Enforceable Contract against infant

(a) Contract for necessaries, that is goods and services that are suitable for his condition in life, for example, education ,clothing and food. Thus food., is essential to everybody but if a minor is well provided with food, he will not be liable in contract if he orders for more. in ***Nash v. Inman[1908]2 K.B.1.*** where a dressmaker supplied a custom-made fanciful suits to a Cambridge infant undergraduate for his matriculation, it was held that the plaintiff action would fail, the suits being essentially a luxuries and not necessaries.

(b) Contract for services service or a apprenticeship are enforceable against an infant. In ***Doyle v. White City Stadium Ltd, [1935]1 K. B.110*** an infant boxer entered into an agreement to fight within the rules and that he would not be paid his entitlement if he

violated the rules. There was a violation and he was not paid. He sued the organization. Held that he was bound by the agreement as for his benefit.

(c) Trading contracts and promises of marriage are enforceable against an infant. In ***Shears v. Mendeloff (1914) 30 TLR 342*** where an infant boxer employed a Manager whom he paid he paid on commission basis, it was held that he was not liable being a trading contract.

3.2 Contracts by infants.

A contract made by an infant can be classified into;

(i) Voidable contract

(ii) Valid contract

(iii) Void contracts

3.2.1 Voidable contracts:-

The rules of common are that a contract made by an infant at the instance of an infant is binding on him. Certain contracts are treated as binding on him unless he repudiates them within a reasonable time while others are not binding on him unless he ratifies them when he reaches the age of majority. The contracts are those an infant acquires an interest in the subject matter of a permanent nature, that is, contracts to which continuous or recurring obligation, are incident, and where an infant undertakes such a contractual obligation, he remains bound by it until he decided to put an end to it.

Examples are;

a. where an infant purchases shares in a company, he acquires an interest of a permanent nature with a obligation that he is bound to discharge until he repudiates the contract and;

b. an infant in partnership agreements although he is not liable for partnership debts incurred during his infancy, he has no right to prevent their discharge from the common assets. The contract continues and he may repudiate at the age of majority. If he did not, he will be holding himself not as a partner and becomes liable for debt incurred since his majority.

3.2.2 Valid contract:-

Two contracts are valid on an infant. These are contracts of

(a) contract of necessaries

(b) contract of service that are beneficial

(a) Contract on Necessaries:

The **Nigeria Sale of Goods Act 1958**, as amended, defines necessary goods as goods suitable to the condition of life of an infant and to his actual requirements at time of sale and delivery.

The Nigeria Act further provides that where necessaries are sold and delivered to an infant or minor to a person who by reason of mental incapacity or drunkenness is incompetent to contract, he must pay a reasonable price thereof. The provision appears to say that an infant is obliged to pay for necessaries, not just when they are sold but when they are delivered to them. It has been stated that this could not be so at law common since the agreement is purely contractual. Therefore, an infant is liable for an executor contract for the sale of necessaries and not only on delivery. However, I hold the view that an infant's liability for the sale of goods is quasi-contract and partly statutory and delivery is an extension of the contract and without it, an infant is not obliged to pay the real price for the goods but only a reasonable price. Thus, in ***Roberts v. Gray (1913) 1 KB 520***, an infant was held liable on an executory contract for education and training. This may not be applicable to where an infant purchases goods.

The second issue on the statutory provision is that the goods must be suitable for the condition in life of the infant requirement at the time of sale and delivery. The provision makes it clear the goods must be suitable also at the time of delivery. The goods must be suitable for his actual requirement not only when the contract was concluded but also when the goods are delivered. Thus, in ***Nash v. Imman (1908) 2 KB 1***, the defendant was an undergraduate at Cambridge. He was sued by the plaintiff, a tailor for £122. 19s being the value of clothes supplied to him. The clothes included eleven fancy waistcoats at two guineas each. The defendant was an infant at the time of the sale and delivery, and he already had an adequate supply of clothes suitable for his condition in life. The court held

that an action to claim failed because the tailor did not adduce evidence that the clothes were suitable to the condition in life of the student.

Alderson B. gave the most comprehension meaning of necessaries in ***Chappel v. Cooper (1844) 13 Md W 253.***

> ***"Things necessary are those without which an individual cannot reasonably exist. In the first place, food raiment, lodging and the like. About these there is no doubt. Again as the paper cultivation of the mind is expedient as the support of the body, instruction in art or trade, or intellectual, moral and religious information may be necessary also. Again, as man lives in society, the assistance and attendance of others may be necessary to his well being. Hence, attendance may be the subject of an infants contract". Then, the classes being established, the subject-matter and extent of the contract may vary according to the state himself. His clothes may be fine or coarse 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 full age, so again, the nature and extent of attendance will depend on his position in society. But 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 an infant contractor. Thus, articles of mere luxury are always excluded, though luxurious articles of utility are in some cases allowed".

In ***Peters v. Fleming (1840)6 M & W 42*** a watch was held to be necessary for an undergraduate, but the question whether a gold chain was necessary was left to jury, for it depends on his station in life. What is a necessary for an infant from a rich and well-to-do family will not be for an infant from poor family. It is a question of fact whether goods are capable of being necessaries and the process involves the status of the infant in life.

Goods, which are supplied to an infant for the purpose of trading, are not a contract for necessaries. The infant is not bound to pay for them, so also agreement for work or labour. An infant who married is liable for contract made by his wife when she had the authority to pledge for his credit e.g. food or essential household goods.

(b) Beneficial Contract of Service

It is of advantage that an infant should be trained for future trade or profession. To obtain livelihood, he may enter into contract of apprenticeship, services, education and instruction. Such a contract must, however substantially be for the benefit of the infant or to his advantage.

An infant is free to repudiate any contract, which is not for his benefit. The fact that some terms are prejudicial to him is not enough to repudiate the contract, as the advantages are more that the disadvantages.

3.2.3 Contract Absolutely Void:

The Infants Relief Act renders certain contract absolutely void. These are:

i. Contract of loan or advancement or bank overdraft;
ii. Contract for goods other than necessary goods and ;
iii. Account stated.

i. Contract of loan

Loans may be obtained in banks, finance houses ad from individuals or corporate bodies. Apart from loan advanced to an infant to enable him purchase necessaries, an infant cannot be liable for any loan given to him Nash v. Imman (1908) 2 KB 1. An infant can open a bank account. The bank, must, however, be cautious of granting advancement or overdraft to an infant except they can prove it is for the purchase of necessaries. Any loan contract is absolutely void.

ii. Contracts for goods other than Necessaries

The determination of goods that are necessaries is a question of mixed law and fact. The judge is in the right position to determine the articles that are capable of being regarded as necessaries. A watch was held for an necessary for an under graduate ***Peters v. Fleming (1840)6 M & W 42.*** The contracts for necessaries for an infant must be beneficial to him and most not contain harsh or onerous terms ***Fawcett v. Smethurst (1914) 84 LJ KB 473***. A contract where goods are supplied for the purpose of trading is not a contract for necessaries. An infant is not bound to pay for such goods or agreement for work or labour to carry on a trade ***Merchantile Union Guarantee Corp Ltd. V. Ball (1937) KB 498***.

iii. Account Stated

An account stated is defined as 'a claim by one party to payment of a definite amount, which is admitted to be corrected by the other party ***Chitty on Contracts (25th Oct.) para. 2057***. This is merely an admission of a debt out of the court and is equivalent to a promise from which the existence of a debt may be inferred. Such admission is only evidence of a debt and can be rebutted. An example of account state which is I.O.U.

In contracts that are absolutely void against the infant, the contract remains binding on the adults concerned. However, where an infant sues on an absolutely void contract, the court will deny him remedy because there is no mutuality unless an infant has performed his own part of the contract. Again, if any part, or the whole of the loan is expended in the purchase of necessaries, the lender can recover the amount expended under an equitable doctrine of subrogation. Subrogation simply put is, substitution of one person to the rights and duties of the original person. The lender can be subrogated to the seller of necessaries to enable him recover the amount of the loan spent in purchasing necessaries.

The provision is not limited to goods sold. Goods exchange is also included. The provision states that the contract is absolutely void but this does not mean that the contract is not without effect. The other contracting party remains bound but he cannot be granted specific performance against an infant.

Moreover, goods or money paid or delivered to an infant is not void and it is recoverable only if there is a total failure of consideration ***De Francesco v. Barnum (1980) 45 Ch. D 430.***

In ***Valentine v. Canali (1889) 24 QBD 166*** it is not only the loan made to an infant, which is void, the guarantee of the loan is also void since there is no valid loan and so no debt to guarantee. In ***Coults & Co. v. Browne-Lecky (1947) KB 104 (1946) 2 All ER 207***, the guarantors of an infant loan were hold not liable on their contract of guarantee since the principal debt was itself void.

3.3 The Position At Common Law

The general rule at common law was that contracts made by an infant were voidable at his options, i.e., not binding on the infant but binding on the other party. The contracts were classified into groups for this purpose:

(a) Contracts which were binding on the infant unless he repudiated them during infancy or within a reasonable time of attaining his majority, and
(b) Contracts which were not binding on him until and unless he ratified them after the attainment of majority.

Furthermore, two types of contracts were regarded as absolutely binding at common law. These were (a) contracts for necessaries and (b) beneficial contracts of service.

STATUTORY INTERVENTION

The position at common law was modified by the Englisg Infants Relief Act of 1874 in the following manner:

(a) The Act specifically declares that three particular types of contracts with infants are absolutely void. These are,
    (1) Contracts of loan, i.e., lending money to an infant,
    (2) Contracts for goods (other than necessary goods) and
    (3) Accounts stated. This rather obscure and confusing term, "account stated", a defined in Chitty on contracts, 5th ed. By A.G. Guest as follows at para 057 "…a claim by one party to payment of a definite amount. This is merely an admission of a debt of court and is equivalent to a promise from which the existence of a debt may be inferred. Such admission is only evidence of a debt and can be rebutted" An "I.O.U." for example, is an account stated.
(b) Secondly, the Act stipulated that it would no longer be possible for an infant to ratify at majority, those contract which were formerly not binding on an infant unless

ratified by him after the attainment of majority. In other words, if he now ratifies such contracts, such "ratification" has no legal effect; it is nugatory.

-LIABILITY FOR NECESSARIES

Section 2 of the Sale of the Goods Act section 3 of Sale of Goods Law, West defines necessary goods as "good suitable to the condition in life of such an infant or minor or other person, and to his actual requirement at the time of sale and delivery" Emphasis supplied.

In the same section, the Act provides that: a person who by reason of mental incapability or drunkenness is incompetent to contract, he must pay a reasonable price, thereof.

-THE MEANING OF NECESSARIES

Still the best and most comprehensive definition of necessaries is that give by Alderson, B., in ***Chapple v. Cooper: (1844) 13 M. & W. 53 at p. 58***

Things necessary are those without which an individual cannot reasonably exit. In the first place, food, raiment, lodging and the like. About these there is no doubt. Again, as the proper cultivation of the mind is as expedient as the support of the body, instruction in art or trade, or intellectual, moral and religious information may be a necessary also. Again, as man lives in society, the assistance and attendance of others may be a necessary to his well-being. Hence attendance 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 accord to the station he is fill, and the medicines will depend on the illness with which he is afflicted, and the extent of his probable means when of full age. So again, the nature and extent of the attendance will depend on his position in society… But in all these cases it must fist 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.

-LOANS FOR NECESSARIES

An infant cannot be liable for a loan advanced to him to enable him purchase necessaries. If, however, the loan any part of it is expended in the purchase of necessaries, the lender can recover the amount expended thereon under the equitable doctrine of subrogation. Subrogation means the substitution of one person or thing for another, so that the same rights and duties which attached to the original person or thing attach to the substituted one. In this case, the lender whose loan has been used to buy necessaries is subrogated to the seller of the necessaries. That is, he is placed in the position of the seller of the necessaries. That is, he is placed in the position of the seller of the necessaries, thus enabling him to recover that amount of the loan spent by the infant in purchasing.

4.0 CONCLUSION

Where an infant fraudulently misrepresents his age by deceiving the other party that he is over 21 years, the plea of infancy is still open to the infant. However, guilty will grant relief against the infant by compelling him to restore any ill-gotten induced by fraud. This is made possible by the doctrine of restitution. The doctrine operates;

i. If the infant obtains goods by fraud, and remains in possession of them, the infant will be made to return them.

ii. Where an infant has parted with goods, there is an authority, which held that hs is accountable for the proceeds of sale ***Stock v. Wilson 1913) 2 KB 235***. However see the principle declares in ***Lesile Ltd. v. Sheill (1914) 3 KB 607. 627*** where Lord Summer declared “Restitution stopped where repayment began”.

iii. Where an infant obtains a loan by fraud, that money cannot be recovered, thus in ***Lesile Ltd. v. Sheill (supra)***, an infant could be compelled to restore a loan of

$400 which he has obtained by fraudulent misrepresentation of his age, for to do so would constitute an enforcement of the contract, not application of the doctrine of restitution. The essence of a loan of money is that the borrower shall repay the equivalent sum, sometimes, with interest. This is exactly what the **Infant Relief Act** declares void. It will thus defeat the purpose of the law.

5.0 SUMMARY

The general principle is that a contract made by a minor with an adult is binding on the adult but not on the minor. If, after attaining his majority, he ratifies it by an act confirming the promise he made when a minor, he is bound. There need be no consideration for the act of ratification. A contract by a minor is not void and any money or property transferred by him under the contract can be recovered only if there has been a total failure of consideration.

"... where necessaries are sold and delivered to an infant (or minor)... he must pay a reasonable price therefor.'Necessaries' in this section means goods suitable to the condition of life of such infant (or minor)... and to his actual requirements at the time of sale and delivery."

"Necessaries" are those things without which a person cannot reasonably exist and include food, clothing, lodging, education or training in a trade and essential services. The "condition of life" of the minor means his social status and his wealth. What is regarded as necessary for the minor residing in a stately home may be unnecessary for the resident of a council flat. Whatever the minor's status, the goods must be suitable to his actual requirements-if he already has enough fancy waistcoats, more cannot be necessary: Nash v. Inman [1908] 2 KB 1, CA.

6.0 TUTOR-MARKED ASSIGNMENT

Who is a Minor

The meaning of necessaries in the context of both goods and services

Jane left school last year at the age of 16. She took a job as an office assistant in an insurance firm.Her wages are N10,000 per month, and she is required to give three months' notice to terminate her employment.

She recently agreed to buy a 'Suzuki' motorcycle so that she could spend more time with her boyfriend, John, who is mad about motorcycles. She also signed a written agreement to buy a one quarter share in AIICO insurance company.

Jane has now been offered a job as a receptionist at N15,000 per month, provided she can start immediately. She has failed to pay for the motorcycle or the shares in AIICO Insurance company. Advise Jane.

7.0 REFERENCES/FURTHER READINGS

OLUSEGUN YEROKUN, Modern Law of Contract, 2nd ed., Nigerian Revenue Project Publishers (2004)
T.O DADA, General Principles of Law, 3rd ed., T.O. Dada & Co. (2006)
I.E. SAGAY, Nigerian Law of Contract, 2nd ed., Spectrum Law Publishing (2001)
EWAN MACINTYRE, Business Law, 1st ed., Pearson Education Limited (2008)

MODULE 3 CAPACITY TO CONTRACT

UNIT 2 ILLITERATE PERSON

6.0 Tutor-Marked Assignment

7.0 References/Further Readings

1.0 INTRODUCTION

An illiterate is like any other person who makes an oral or written contract. Where the contract is oral, his position is not different from that of any adult person. He is fully liable for all his obligations under the contract and he enjoys no privilege over the other party. Where the contract is written, whether under seal or not, special rules apply and the rules are to be found in various laws enacted for the protection of illiterate person. In addition, judicial interpretations of the scope, limits and qualifications of the statutes are of general nature. The principles, which are laid down, apply equally in all the statutes.

2.0 OBJECTIVES

- Should understand who an illiterate person is
- Should be able to identify an illiterate person under a contract
- The position of the law on contracts entered into by illiterates

3.0 MAIN CONTENT

3.1 WHO IS AN ILLITERATES PERSON?

The definition is important to determine such a person is entitled to the protection of the relevant law. The judicial pronouncements have shown that there is no agreeable definition.

Thus, in ***P.Z. Co. Ltd. v. Gusau (1962) 1 All NLR, p 244 and Kantoma***, an illiterate is interpreted to mean 'illiterate in the language used in the document under consideration'. Thus, in effect, this means whether the language he knows is Yoruba or Hausa or Igbo or

English or French, and it is irrelevant that the person might be illiterate in other languages.

However, the **Illiterates Protection Ordinance** provides in section 3 to mean a person who is unable to read the document in question in the language in which it was written subject to the provision that the expression includes a person who though not totally illiterates, is not sufficiently literate to read and understand the consents to the document. This explains everything.

In ***Osefo v. Uwania (1971) 1 ALR Comm. 421*** an illiterate person, according to Oputa J, is a person who is unable to read with understanding the document made or prepared on his behalf. Illiteracy is purely comparative. A graduate in English may well be an illiterate in German. In similar words, the Supreme Court held in ***SCOA Zaria v. Okon (1960) NLR 34*** that although a person may be sufficiently literate to sig his name, and read figures, he may not be sufficiently literate to understand the meaning and effect of

the document he is signing and in such a case, the provision of section 3 of the **Illiterates Protection Act** must be complied with.

In ***Lawal v. G B Olllvant (Nig. Limited) (1970) 2 ALR Comm. 208 CA*** the **Western State Court of Appeal** stated that the law must avoid the narrow and technical interpretation of illiterate. According to the court, the mischief aimed at by the law was to prevent a person who executes a deed from being cheated, if in fact, he did not understand the purpose of his action.

A person who can read and write in French can be cheated if he takes part in a binding agreement in English language. He is an illiterate person for the purpose of that transaction, and was therefore entitled to the protection of any law aimed at protecting illiterate persons.

3.2 THE LAW ON ILLITERATES PROTECTION

The laws containing provisions on the protection of illiterate person in contractual agreements are:

i. Illiterates Protection Act
ii. Land Instruments Registration Law.

Section 3 of the Illiterates Protection Act provides;

"any person who shall writes any letter or document at the request, or on behalf or in the name of illiterate person shall also write on such letter or other document, his own name as the writer thereof and his address and his so doing shall be equivalent to statement".

(a) That he was instructed to write such letter or document by the person to whom it purports to have been written and that the letter or document fully and correctly represents his instruction;

(b) If the letter or document purports to be signed with the signature or mark of the illiterate person that prior to its being so signed, it was read over and explained to the illiterate person and that the signature or mark was made by such person.

Section 8 of the **Land Instruments Registration** Law provides:

> **"No instrument executed in Nigeria after the commencement of this law, the grantor or one of the grantors, whereof is illiterates, shall be registered unless it has been executed by such illiterates grantor or grantor in the presence of a magistrate or Justice of the peace and is subscribed by such a magistrate of Justice of peace as a witness thereto".**

The duty of the writer of a document, which an illiterates is involved, has been strictly enforced in courts. The writer must:

i. Also write his own name and address on the document and;

ii. Ensure that it was read and explained prior to the document being signed and the signature or mark was in fact made by the illiterate person.

Sometimes, it may not easy to determine the writer of the document. Usually, the writer is the person in whose hand the document was written.

Thus, in ***PZ & Co. Ltd. v. Gusau and Kantoma (1961) NRNLR 1, see also UAC v. Edema & Ajayi (1958) NRNLR 33***, the second defendant agreed to guarantee the payment of a business debt owned to the plaintiff by the first defendant. The second defendant could neither read nor write in English. He raised a defense of illiteracy and failure to comply with Illiterates Protection Act. The court had consider who the writer of the document was. Evidence showed that a typist in the plaintiff's office typed the document and the plaintiff's manager, who was the writer of the guarantee, filled the blank space left for the name and address of the second defendant. It was held that since the plaintiff's manager filled in the guarantee document, the manager was the writer of the document. The Supreme Court in the above case confirmed the view.

It appears from the decision of the cases, that the writer of such a document not necessarily the person who negotiates the agreement or who types it. It is the person who enters the name and address of the illiterate person in the document. Where such a writer fails to enter his name and address' and prepares a statement that the agreement was read over and explained to the illiterate before he put his mark on the document, such a writer cannot enforce the agreement against the illiterate person ***UAC v. Edema & Ajayi (1958) NRNLR 33.***

3.3 CONTRACT MADE BY ILLITERATE PERSONS

Where the contract made by an illiterate person is an oral one, his position is no different from that of any adult person. He enjoys no privilege over the other party (even if the

latter is a literate person) and is fully liable for all his obligations under the contract, according to the usual principles. Where, however, the contract is in written from, whether under seal or not, then special rules apply. There are to be found in various laws enacted in Nigeria for the protection of the illiterate contractor. These laws are either general in form, i.e., laying down stipulations for all agreements involving illiterate parties, or are directed at a particular type of transaction, for example, land transactions. However, since judicial interpretation of the scope, limits and qualifications of these enactments have been general in nature, the principles laid down in these cases apply to all statutes containing provisions in respect of the illiterate contractor.

1. The Illiterates Protection Laws and the Land Instruments Registration Law:

The Illiterates Protection Law Cap. 67, 1994 Laws of Lagos State. Similar enactments exist in all the other State and the Land Instruments Registration Law Cap 56, Laws of Western Nigeria (1959) are two good illustrations of laws

containing provisions for the protection of illiterates in their contractual transactions.

Thus, Section 2 of the Illiterate Protection Law provides as follows:

> ***Any person who shall write any letter or document at the request, on behalf, or in the name of any illiterate person shall also write on such letter or other document his own name as the writer thereof and his address; and his so doing shall be equivalent to a statement—***

(a) That he was instructed such letter or document by the person for whom it purports to have writing and that the letter or document fully and correctly represents his instructions; and
(b) If the letter or document purports to be signed with the signature or mark of the illiterate person, the prior to its being so signed it was read over and explained to the illiterate person, and that the signature or mark was made by such person.

Section 8 of the Land Instrument Registration Law provides that:

> ***No instrument executed in Nigeria after the commencement of this law, the grantors, whereof is illiterate, shall be registered unless it has been executed by such illiterate grantor or grantors in the presence of a Magistrate or justice of the peace as a witness thereto.***

2. Duties of the writer under the Illiterate Protection Act

The dual duties of a writer of a document for or on behalf or at the request of an illiterate person, have been very strictly enforced the courts. The writer of such a document must:

(a) Also write his own name and address on the document; and

(b) Ensure that prior to the document being signed by the illiterate person, it was read over and explained to him, and that the signature or mark was in fact made by the illiterate person.

3. MEANING OF ILLITERACY

The most important issue for the court to determine in all such case, is whether the defendant is really an illiterate person, and is thus entitled to the protection of the relevant law. The cases disclose some disagreement on this vital issue. Thus, in ***P.Z. & Co. Ltd. v. Gusau and Kantoma (Supra)***, the High court took the view that illiterate: meant illiterate in the language used in the document under consideration. It is relevant that the defendant might be illiterate in some other language.

The Illiterate Protection Ordinance does not supply any definition of the expression "illiterate person" in section 3, but I take it to mean a person who is unable to read the document in question in the language in which it was written, subject to the proviso that the expression includes a person who, though not totally illiterates, is not sufficiently literate to read and understand the contents of the document.

In some other cases, however, the courts have adopted a very technical and narrow definition of illiteracy. Thus, in its decision on appeal by the second defendant in PZ & Co. Ltd. v. Gusau and Kantoma, already referred to, the Supreme Court adopted the strict dictionary meaning of illiteracy. Relying on the Shorter Oxford English Dictionary, 3rd edition, the court (Taylor, F.J.) defined "illiterate" as meaning: Ignorant of letters or literature; without education…..Unable to read, i.e., totally illiterate… An illiterate, unlearned or uneducated person… one unable to read.

3.4 LIMITS TO THE APPLICABILITY OF THE "ILLITERACY" LAWS

As had already been indicated, ***see Anaeze v. Ayanso (1993) 5 NWLR (Pt. 291) P. 1 at 24; Agbara v. Amara (1995) 7 NWLR (Pt. 410) 712 at p. 732***, the **Illiterates Protection Laws** are meant to protect a person illiterate in the language of a contractual document from being cheated, if in fact he did not understand the document he has signed. The laws are not meant to be used as engines of fraud. An illiterate person may not use the provisions of these laws as a means of fraudulently evading trading obligations whose implications he was fully aware of the time the bargain was struck. Thus, it is possible for a person who is technically illiterate to be denied the protection of law if it appears that he understood the purport of a bargain, even though the other party failed to comply fully with the provisions of the law.

In ***Lawal v. G.B (Nigeria) Ltd.(1970) 2 ALR***, already discussed above, an illiterate person mortgaged his property to the defendants. The provision of the Land Instrument Registration Law requiring the document to be executed in the presence of a Magistrate or a Justice of the Peace was not complied with. The plaintiff asked the court to declare to the registration of the mortgage in the defendant's name null and void. The plaintiff's excuse that he handed over his title deeds to the defendant in the belief that he (the plaintiff) was acting in the role of a witness to a sale of goods by the defendant to his (the plaintiff's) friend, rather than as a mortgagor of his property, was patently false.

We cannot see the necessity for a witness to the signatory of a document having to surrender his own title deed of his property just for the purpose of being such a witness. Kayode Eso, J.A.

4.0 CONCLUSION

The above review of the application of the Nigerian "Illiteracy" laws in contracts, shows that although by and large the laws are being satisfactory applied, certain principles need to be re-emphasised:

(a) The question whether or not a person is illiterate should be related directly to the language in which the document in question is prepared. The dictionary meaning of the "illiterate" should be discarded. It is worse than unless. It is mischievous.

(b) Any person who understands the contents of a document which he signs should not be regarded as an illiterate person under the "illiteracy" laws. These laws are meant for the protection of innocent people and should, therefore, not become weapons of fraud in the hands of delinquent illiterates.

(c) Contracts infringing the provisions of these laws are void with respect to a writer who wants to enforce them, but are enforceable by the illiterate person and third parties. But as has been suggested above, there is no reason why the writer should not be allowed to enforce the contract where it is established that the contents of the document were indeed explained to the illiterate person, and that the writer did not knowingly and willfully fail to comply with the provisions of the relevant law.

5.0 SUMMARY

By now you should be able to identify and understand what the law says about an illiterate person. The law on illiterate protection and the effect or the consequence of contract entered into by an illiterate person. Most importantly the limits t the applicability of the illiteracy laws.

6.0 TUTOR-MARKED ASSIGNMENT

1. Who is an illiterate person, according to section 3 of the Illiterate Protection Act.

2. Outline the duties of the writer of a document under the Illiterate Protection Act, which an illiterate is involved.

3. Any limits to the applicability of the illiteracy laws.

7.0 REFERENCES/FURTHER READINGS

OLUSEGUN YEROKUN, Modern Law of Contract, 2nd ed., Nigerian Revenue Project Publishers (2004)

T.O DADA, General Principles of Law, 3rd ed., T.O. Dada & Co. (2006)

I.E. SAGAY, Nigerian Law of Contract, 2nd ed., Spectrum Law Publishing (2001)

EWAN MACINTYRE, Business Law, 1st ed., Pearson Education Limited (2008)

MODULE 3 CAPACITY TO CONTRACT

UNIT 3 CORPORATIONS

1.0 INTRODUCTION

A corporation usually has the rights, powers and privileges to enter into contracts concerning the purchase and sale of real property, unless specific restrictions are located in the articles of incorporation or the corporation has not enacted empowering provisions in its by-laws.

A corporation can be described as a business entity created by statute law and established by articles of incorporation. Corporations vary from small *privately-held* operations to large or *public* companies that actively trade shares in the marketplace.

2.0. OBJECTIVES

At the end of this unit you should be able to understand

- What the status of a corporation under the Companies and Allied Matters Act 1990
- The contractual capacity of a corporation.
- Under capacity can a company enter into a contract?

3.0 MAIN CONTENT

3.1 Meaning of Corporation

A corporation is an artificial person created by law, separated and distinct from the individuals that make it up. Therefore, every company incorporated under the provisions of the law enjoys a legal personality and has a separated legal existence and perpetual succession different from those of the individual shareholder who compose it. A

corporation is created by registration, and no company can operate in this country unless it complies with the law for the time being in force in relation to the establishment of companies.

A corporation, being an artificial legal entity enjoys the capacity to contract and be bound in contract. But, because of its artificial nature, and therefore lacking some of the attributes of personality, a corporation cannot enter into certain contracts of a personal nature. For example, a corporation cannot be born, but it can be amalgamated with another company; a corporation cannot bear children, though it can have subsidiaries; a corporation cannot die though it can be wound up or dissolved. Because of the artificial nature of its existence, a corporation can only act through agents.

To determine the contractual capacity of a corporation, one has to look at the instrument creating it. Thus, in the case of a corporation created by Act of Parliament, e.g., Electricity Corporation of Nigeria, or the Nigerian Railway Corporation, its contractual capacity is governed by the statute creating it. As regards those incorporated under the **Companies Act, 1968, Act No. 51 of 1968,** their contractual capacity is governed by the terms of their memoranda of association which must set out the companies' contractual powers. In fact, the general rule is that the contractual powers of a corporation registered under **1968 Act** is limited to those expressly or impliedly authorized by its memorandum of association. Any contract authorized, are *ultra vires* (i.e., beyond the powers of the corporation) and therefore, void and enforceable; consequently, it will not bind the corporation even if all its members ratify it. By this *ultra vires* doctrine, the activities of the company are brought under control, so that the officers of the company who exercise the power of the company on behalf of the shareholders are in consequences prevented from engaging in activities contrary to the objectives if the company. Thus, in the leading case of ***Ashbury Railway Carriage and Iron Co. v Riche (1895) L.R. 7 H.L. 653***, a company which was empowered by its memorandum and articles of association to make and sell railway carriage embarked upon purchase of a railway concession, in Belgium, at the bidding of its directors. The company attempted to ratify the transaction

The court held that, the concession agreement was void being ultra vires the company and therefore void to that extent.

Also, in ***London County Council v Att-Gen (1902) A.C. 165***, the London City Council had statutory powers to purchase and work tramways.

It was held that, they could not work omnibuses, the omnibuses not being incidental to the tramway business.

However, a company can enter into a contract though its authorized officers if the contract is executed in the same way as would by law be done if the contract was being

executed by a private individual **(Companies Act, 1968, S. 32(1)(c))**. Therefore, under **section 32(1) of the Companies Act, 1968**, directors/managers of a company can enter into contracts on behalf of the company by word of mouth, in writing or under seal, depending on the nature of the contract, just as in the case of natural persons. The common law requirement for seal is no longer good law, except that it may be noted that where the law prescribes that a contract should be executed under seal and in writing if made by a private individual, it will sufficient if such a contract is executed in writing under seal on behalf of the company. **Companies Act, 1968, S. 32(1)(a); see Achike, op. cit., p. 39; Adesanya and Oloyede, op. cit., pp. 37-8**.

3.2 Unincorporated Associations

Unincorporated associations, with the exception of trade unions, have no contractual capacity and, therefore, cannot enter into a contract nor be bound contractually. The general practice is that such associations can only be sued or sue under representative action made through its principle officials.

However, trade unions can enter into contracts, and actions can be maintained against them like other entities. **See Trade Unions Act, Laws of the Federation, 1958, Vol. VI. Section 13(1) of the Trade Unions Act (Ibid)** makes it mandatory for trade unions to be registered. **See Achike, op. cit., pp. 39-40**

Corporations

Specific or general statutes create a corporate entity such as the **Companies and Allied Matters Act, 1990, National Insurance Corporation of Nigeria Act, 1969**. In law, a corporation is regarded as an abstraction. It is a legal person that has the capacity to enter into any contract that is within the limit of the object clause of the company in the Memorandum of Association. The powers in the object clause enables the corporation to exercise implied power, which is reasonably incidental to the exercise of the express power.

At common law, where the corporation exercises its power outside the power, it acted ultra vires, and any transaction entered into is void. However, in certain circumstances, an ultra vires contract may be enforceable against a company by a person dealing with the company in good faith provided the directors had approved the transaction. The corporation is an artificial person it can only act through its agents.

(a) Statutory Corporations

These are incorporated bodies created either by Act of Parliament, or essentially by statute, which in the Nigerian case are decrees or edicts. The decree usually charges the corporation with some functions and this normally involve nearly all the functions of corporations incorporated under Companies and Allied Maters

Act, 1990. Such corporations arre sometimes referred to as quasi-corporation. The principle underlining the recognition of the right to sue and be sued is stated in English case of ***Taff Vale Railway Co. and Amalgamated Society of Rly Servants, Ashbury Railway Carriage and Iron Co. v. Riche (1875) L R. 7 HL 563***, where Lord Hailsbury L.C. stated.

''if the legislature has created a thing which can own property, which can employ servant, and which can inflict injury, it must be taken, I think, to have impliedly given the power to make it suable in a court of law, for injuries purposely done by its authority and procurement."

The judge went further and said "although a corporation and an individual or individuals may be the only entity known to the common law who can sue and be sued, it is competent to the legislature to give to an association of which individuals which neither a corporation nor a partnership nor an individual a capacity for owning property and acting by the agents, and such capacity in the absence of express enactment to the contrary involves a necessary correlative of liability to the extent of such property for the acts and defaults of such agents.

Nigerian case of ***Chief Andrew Thomas v Local Government Services board [1965] NMLR 310*** the local government services board, though unincorporated was held to be capable of suing and be sued. Similarly, in ***Kpebimoh v The Board of Governors, Western Ijaw T.T.C (1966) NWLR 130*** the court held that the Board of Governors of the collage, though an unincorporated body, empowered to perform certain statutory function, which could result in injury to have implied power to sue and be sued in a court of law.

(b) Unincorporated Associations

Association such as clubs, or charitable institutions, in law has no legal entity than the members that compose it. It is nevertheless a legal person. Such association can neither sue or be used on contracts made in their names or on their behalf and they cannot authorize an officer to sue on their behalf for liability for the work done or goods supplied. Only the person who gave the order can be liable for the work or the goods supplied or who either gave expressly or impliedly or ratified the order after it had been given. In creditor and debtor situation, the creditor cannot pursue for payment on any of the members, but he can have recourse to the fund and not to the members even if all the members agree.

A corporation created by Royal Charter has always had the same contractual capacity as an ordinary person but a company incorporated under the Companies Act could, until recently, only make such contracts as were within the scope of the objects set out in its memorandum of association. Anything beyond that was ultra vires and void.

In the leading case of Ashbury Railway Carriage and Iron Co. Ltd v. Riche (1875) L.R. 7 H.L. 653 the objects set out in the company's memorandum were "to make and sell, or lend on hire, railway carriages and waggons, and all kinds of railway plant, fittings, machinery and rolling stock; to carry on the business of mechanical engineers and general contractors; to purchase, lease, work and sell mines, minerals, land and buildings; to purchase and sell as merchants, timber, coal, metals, or other materials, and to buy any such materials on commission or as agents." The directors purchased a concession for making a railway in Belgium and purported to contract with Riche that he should have the construction of the line. Riche's action for breach of the alleged contract failed since the House of Lords held that the construction of a railway, as distinct from rolling stock,

was ultra vires the company and that therefore the contract was void. Even if every shareholder of the company had expressed his approval of the act, it would have made no difference, for it was an act which the company had no power, in law, to do. Important changes were made by section 108 of the Companies Act 1989, substituting a new section 35 of the Companies Act 1985. Under that new section it remains the duty of the directors to observe any limitations on their powers flowing from the company's memorandum (section 35(3)) and a member of a company may bring proceedings to restrain the doing of an act in excess of those powers (section 35(2)); but, by section 35(1):

"The validity of an act done by a company shall not be called into question on the ground of lack of capacity by reason of anything in the company's memorandum."

So, by applying the modern law to the Ashbury case, the directors committed a breach of duty by making the contract and might have been restrained by action by a member; but once the contract was made its validity could not be questioned provided that the making of the contract was "an act done by the company." It might be objected that it was not such an act because the directors had no power to make the contract. This objection is met by section 35A(1):

"In favour of a person dealing with a company in good faith, the power of the board of directors to bind the company, or authorise others to do so, shall be deemed to be free of any limitation under the company's constitution."

A person is presumed to have acted in good faith unless the contrary is proved and is not to be regarded as acting in bad faith merely because he knows the act is beyond the directors' powers. An ultra vires act by the directors may now be ratified, but only by special resolution which does not affect any liability incurred by the directors or any other person-any such relief must be agreed to separately by special resolution.

Formerly a corporation's contracts were invalid unless made under the corporate seal but, since the Corporate Bodies' Contracts Act 1960, a corporation may make contracts in the same manner as a natural person-that is the contract may be made orally unless a special rule requires a written contract-as in contracts for the sale or disposition of an interest in

land-or evidence in writing-as in the case of a guarantee within section 4 of the Statute of Frauds 1677.

4.0 CONCLUSION

They are juridical persons which have contractual powers limited to those expressly stated in their Memorandum and Articles of Association. In ***Salomon v. Salomon (1897) A.C. 22(H.L),*** however, it was held that a company was distinct and separate from its founders, hence the doctrine of corporate personality in company law and practice. Such

contracts are, however, subject to the doctrine of "ultra vires" which renders void all contracts not authorized by the objects clause.

5.0 SUMMARY

At common law, where the corporation exercises its power outside the power, it acted *ultra vires,* and any transaction entered into is void. However, in certain circumstances, an *ultra vires* contract may be enforceable against a company by a person dealing with the company in good faith provided the directors had approved the transaction. The corporation is an artificial person it can only act through its agents.

6.0 TUTOR-MARKED ASSIGNMENT

1. Discuss the capacity of a Company under CAMA and the Common Law
2. Discuss and state what the court held in the following cases:
   a. Ashbury Railway Carriage and Iron co. v. riche (1895) L.R. H.L. 653
   b. London County Council v. /att. /gen (1902) A. C. 165

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LAW 233 THE LAW OF OCNTRACT 1

MODULE 3 CAPACITY TO CONTRACT

UNIT 4 MENTAL PATIENTS & DRUNKEN PERSONS

1.0 Introduction
2.0 Objectives

1.0 INTRODUCTION

A person who puts himself in a situation of intoxication is in same position as a lunatic. When a person is in a state of intoxication, his contractual capacity diminishes and becomes limited. If he enters into any contract in such a state of intoxication that he did not know what he is doing and the other party is aware of that fact, the contract is voidable at his option. A lunatic can ratify the contract when he becomes sober. A person entering into a contract with lunatic may enforce the contract if he can prove he had no knowledge of, and took no advantage of, the drunkenness. In case of necessaries supplied to a lunatic, the provision of **Section 2 of the English Sale of Goods Act, 1893**, as amended by **1979 Act**, that a drunken person is obliged to pay a reasonable price of such goods sold and delivered would be applied in our courts even though such provision is not in our sale of goods law.

2.0 OBJECTIVES

- Understand what the law says about Mental Patients
- Identify those termed insane and drunk and the circumstances under which they can enter into a contract if any

3.0 MAIN CONTENTS

3.1 Mental Patients

Such individuals are bound by the contract unless they fall into one of two categories:

Those certified insane by virtue of Part VII of the Mental Health Act 1983 a person may be certified as being insane by two medical practitioners where they are both of the opinion that the person in question is incapable of managing their own affairs and property because of their mental state. In these circumstances, the property of the insane person fails under the control of the court, so that any attempt by the individual to dispose of the property is not binding. It does not seem to be settled whether contracts other than

those to dispose of the property will bind the individual involved. Treitel suggests not, since all contracts are a potential interference with a person's property.

3.1.1 Lunatics

The term lunatic, **Lunacy Act, Cap. 112, Laws of the Federation of Nigeria, 1958, S. 2. See also Lunacy Law, Cap 81, Laws of Eastern Nigeria, 1963 S.2,** includes an idiot and any other person of unsound mind. On principles, a contract cannot exist except there has been an agreement; in sort, as far as the respective parties to the contract are concerned, there must be consensus ad idem. From a logical point of view, it follows that a person of unsound mind or drunkard cannot enter into a contract for he would be lacking the genuine contract necessary for its formation. However, the law is not as strictly logical as that.

First, the general rule in contracts with mental patients, (i.e., persons of unsound mind) or drunken persons id that they are prima facie bound by the contracts they make such contracts are, however, voidable at the instance of the insane or drunken person, i.e., binding until repudiated within a reasonable time after the mental patients must have recovered or of being sober, unless they can show that:

1. At the time of the contract their mental condition was such that they could not understand what they are doing, i.e., appreciate the nature of their act, and
2. That the other party to the contract was aware of their condition, ***Imperial Loan Co. v Stone (1892) 1 QB 599***. Thus, in ***Mancles v Trimborn (1946) 115 L.J.K.B. 305***, an old lady, who had drawn a cheque, successfully repudiated liability thereon on the ground that she was, to the drawee's Knowledge, incapable of understanding the transaction of which the cheque formed a part. But knowledge of this kind is immaterial where the contract is made during a lucid interval, for the ability to consent is then present and the contract would be binding.

Secondly, it is well established that where necessaries are supplied to an insane or drunken person or his wife, suitable to his station in life, section 2 the Sale of Goods Act, 1893, provides that he must pay a reasonable price for them. In other words, an implied obligation arises for him to pay for them out of his property, ***See Re Rhodes (1980) 44 Ch. D. 94.*** In such a case, it is immaterial that the insanity is known to the other party, who nevertheless, must have intended to be repaid for the necessaries he supplied. The

obligation to pay has been converted by the **Sale of Goods Act 1893**, into a statutory obligation to pay a reasonable, not necessarily the contract price. It is provided in section 2 of the Act that:

> Where necessaries are to a person who by reason of mental incapacity or drunkenness is incompetent to contract, he must pay a reasonable price therefor.

This, rule, however, was extended in ***Re Beaan (1912) 1 Ch. 196***. There, it was held that, where money is supplied by way of loan and is spent in the purchase of necessaries for a lunatic, the person so lending will be subrogated to the rights of the creditors supplying the necessaries.

The ancient rule of the common law was that a lunatic could not set up his own insanity (though his heir might) so as to avoid an obligation which he had undertaken. But by 1847 Pollock C.B. was able to say, in delivering the judgment of the Court of Exchequer Chamber in **Moulton v. Camroux, 2 Ex 487**, that "the rule had in modern times been relaxed, and unsoundness of mind would now be a good defence to an action upon a contract, if it could be shown that the defendant was not of the capacity to contract 'and the plaintiff knew it.'" ***Cf. Imperial Loan Co. v. Stone [1892] 1 QB 599, CA***. Section 3 of the **Sale of Goods Act 1979** makes the same provision for persons who are incompetent to contract by reason of mental incapacity as for minors (see above).

A lunatic so found by inquisition was held to be incapable of making a valid inter vivos disposition of property (although he could make a valid will) since this would be inconsistent with the position of the Crown under the Lunacy Acts: Re Walker [1905] 1 Ch 160. Presumably the position of a lunatic so found with respect to contracts not effecting inter vivos dispositions of his property was the same as that of a lunatic not so found; that is, he would be bound unless he could show that he was not in fact of capacity to contract and that the plaintiff knew it. The Lunacy Acts have been repealed, but an order under the Mental Health Act 1983, may have the same effect as a finding of lunacy.

3.1.2. Insane Persons

The insane are the category of people cannot enter into valid contract. However, an exception is when they are in their lucid or crisis-free moments. A contract made by an insane person when in that lucid state is valid while any contract made while he is in crisis is only voidable at his option if only he can prove that he was normal then.

3.2 Those not certified as insane

Where the person is not certified as insane, the contract will be voidable if the other party is aware of the person's disorder and the mentally person did not understand the transaction in question. The burden of proving these two factors is on the mentally disordered person. Further, if the disordered person ratifies the contract on being cured of their condition then they will become absolutely bound by the contract.

Person of unsound mind

As a general rule, the contracts are made with a person of unsound mind are valid, unless in the following circumstances.

i. If by his mental incapacity, he does not understand the nature of the contract.
ii. That the other party is aware of his condition.

If the above conditions are proved by the victim, the contract becomes voidable at its option. Contract entered in to by insane person during their lucid period are binding on them if the contract was entered into before he becomes insane.

3.3 Drunken Person

A person who is under intoxication is in the same position as a lunatic because his concentration is impaired one his Contractual capacity diminished. If he enters into any contract in such a state of mind, he must prove that he did not aware of such fact. The contract is voidable at his option accordingly, when he becomes normal. He can ratify the contract.

A contract is voidable if drunkenness prevents an individual from understanding the transaction they have entered into and the other party is aware of their of intoxication, though this latter situation rarely arises since it must be virtually impossible for a person to be so drunk as not to know what they are without this factor being obvious to the other party. It should be noted that a drunk will be liable to pay a reasonable price for items considered necessaries and in any event will be liable on the contract should they ratify it on becoming sober.

In contract of marriage, the weight of judicial pronouncements favours the view that contract by a drunkard, like contracts entered into by insane persons, are voidable, if the drunkards was so intoxicated as to be incapable of comprehending the nature and effect of the contract, and it is irrelevant whether the state of intoxication was voluntary or otherwise. However, slight intoxication which does not dethrone a person's reason and comprehension may be insufficient to affect the validity of the contract.

A contract, though voidable and not void, at the options of the drunken person may, when he regains his sobriety be ratified by him Mathew v Baxter (1873) L.R. 8 Exch., p. 132. Again, if the lunatic contracted during a lucid interval or the drunkard contracted after he

had regained his sobriety, the contract is valid and enforceable. But the other contracting party or any third party cannot attack the validity of a contract by pleading the infirmity or insobriety of the drunken person, because these pleas are the exclusive priviledge of the person under disability. As already stated, section 2 of the Sale of Goods Act, 1893, provides that drunkards 'must pay a reasonable price therefore', for necessaries furnished to them.

4.0 CONCLUSION

While contractual promises are enforceable against anyone having legal capacity, some persons are deemed by law as either incapable of contracting or having only limited capacity to contract. In cases involving limited capacity, the contract is usually considered voidable; that is, the contract is valid until the individual goes to court to void

it. As long as the person of limited capacity allows the contract to exist, it may not be voided.

5.0 SUMMARY

People with limited capacity to enter a contract include:

- mentally incompetent persons (those having diminished mental capacity);
- intoxicated persons (incapable of understanding the nature of a contract by virtue of excessive use of drugs or chemicals);
- illiterates (unable to read or write); and
- minors (those under the age of majority

6.0 TUTOR-MARKED ASSIGNMENT

Discuss the position of law in respect of contract entered into by the following people

1. Drunk
2. Lunatic

7.0 REFERENCES/FURTHER READINGS

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MODULE 4 CONTENTS OF A CONTRACT

Unit 1 Terms: covenant, Usage, business Efficacy and Implications
Unit 2 Terms: Conditions, Warranties & other Clauses
Unit 3 Terms Exclusion (Exception) Clauses

Unit 4 Contract Terms and Mere Representation

UNIT 1 TERMS: COVENANT, USAGE, BUSINESS EFFICACY AND; IMPLICATIONS

CONTENTS

1.0 INTRODUCTION

In the previous Units you learnt about what contract is all about and the various development in the field. This unit introduces you to the subject matter of "terms of contract" as well as the analysis of the various approaches.

2.0 OBJECTIVES

At the end of this unit you should be able to:

- Identify the subject matter of the terms of contract
- Differentiate between the various approaches to the terms of contract

3.0 MAIN CONTENT

3.1 Terms Of Contract

Whether or not a statement becomes a term of the contract depends substantially on the intention of the parties. Some statements do not form the part of the contract but may have been influential in having a party enters into a contract. Such statements are not of the contract but if found to be false can give rise to an action on the basis of

misrepresentation. The problem lies in deciding if and when a representation made by one party to another, at or about the time of the making of the contract, has become a 'term' of that contract. If it has not been intended as such, then problems still arise if a party, on the strength of that representation, has been induced to enter into the contract. If it is a representation and not a term, but is untrue (a misrepresentation) then this does not give rise to a breach of contract but, as you will see, entitles the other party to certain remedies.

Read again the elements of a misrepresentation, above, and consider what this means in the real world (as reported in various cases). Consider also where a misrepresentation is not a term of the contract but has induced a party to enter into the agreement. Now do the following activity.

Turning aside from consideration of what might constitute a term of a contract, and by now you should appreciate how important that is to the parties, let us now examine the nature of statements — or representations — which are made between parties to a contract. This is

a difficult topic, but if you read the cases used to illustrate the points, then you should be able to gain some appreciation of what is required. Why then is a representation so important to the contracting process, and what happens if the statement has become a 'misrepresentation'?

To commence your understanding of this area of law, the unit will expand on the points made earlier in this section, as they are critical in establishing what constitutes a misrepresentation.

3.1.1 Express Terms

Express terms are those terms that are contained in a contract and are openly articulated by the parties to the contract. Of course, there is always the issue that what was said is actually what parties intended it to mean. The courts usually take an objective approach to ascertaining what the parties intended by the words they used in the contract. ***Eyre v. Measday (1986) 1 All E.R. 488.***

Incorporation By Express Reference

Terms can be incorporated into an agreement by express reference to a third party document. Hence a reference to a term such as ‘CIF’ as defined by INCOTERMS in a contract is sufficient to incorporate the meaning ascribed in INCOTERMS as part of the express terms of a contract.

Implied Terms: Terms may be implied in a contract: (1) based on custom usage; (2) as the legal incidents of a particular class or kind of contract; (3) based on the presumed intention of the parties where the implied term must be necessary to give 'business efficacy' to a contract; (4) as meeting the 'officious bystander' test as a term which the parties would say, if questioned, that they had obviously assumed. ***Powder Mountain Resorts Ltd v. British Columbia (1999-08-24) B.C.S.C.C93-683***

Officious Bystander

Whatever may be the precise legal criterion for implying terms into a contract upon which the parties have not expressly agreed, it would always be necessary for a court of our legal traditional to be very cautious about the imposition on the parties of a term that, for themselves, they had failed, omitted or refused to agree upon. Such caution is inherent in the economic freedom to which the law of contract gives effect. Absent some statutory or equitable basis for intention, it is ordinarily left to the parties themselves to formulate any agreement to which they consent to be bound in law . As MacKinnon LJ, who is usually credited with inventing the fiction of the 'officious bystander', admitted: '(I)n most… cases

the Court has … to find… the obvious common agreement, upon a matter as to which t must have the strongest suspicious that neither party ever thought of it at all, and that, if they had, they would very likely have been in hopeless disagreement what provision to make about it'.

As far as implications in fact are concerned, there is the proposition that resort to the fiction of testing a propounded implied contractual term by reference to what an 'officious bystander' would regard as self-evident may unduly restrain the importation of implied terms proper to a particular case. The officiousness of the bystander merely explains the intervention of that fictional person in the private business of the parties. It says nothing about the attitude or approach of the bystander concerned.

There is no reason why officiousness and reasonableness could not go together. But the time may be coming where the fiction is dispensed with completely and the courts acknowledge candidly that, in defined circumstances, the law to which they give effect permits, according to a desired policy, the imposition upon parties of terms and conditions for which they have omitted to provide expressly. ***Clarion Limited and others v. National Provident Institution 9200) 1 WLR 1888;***

Custom And Usage

Terms grounded in custom or usage in the industry can be implied on the basis is notorious, certain and reasonable so that the parties to the contract would have understood that the custom being relied upon was applicable. ***Lancaster v. Bird (2001) 73 Con. LR 22***

The Legal incident of a Particular Class or Kin of Contract Terms can be implied as a legal incident to a particular class or kind of contract as 'necessary' for the very existence of the contract. This category of implied terms is distinguishable by its disregard for the actual or presumed intention of the parties. Terms implied are those that would necessarily be implied in all such contracts of a particular category or class. ***Canadian Pacific Hotels Ltd. V. Bank of Montreal (1987) 1 S.C.R 71***

Business efficacy:

In business transactions, what the law desires to effects by the implication of a term is to give such business efficacy to the transaction as must been intended at all events by both parties. The court will imply a term to give efficacy to a contract on the simple basis that it is reasonable to do so; nevertheless, consideration of what is reasonable is important in determining whether or not a term should be implied into a contract to give it efficacy. The court may imply a term if such an implication necessarily arises that the parties must have intended that the suggested stipulation should exist. It remains that the term implied into the transaction must be required to give efficacy to the contract. ***Liverpool City Council v. Irwin and Another (1977) A.C. 239 (H.L), Royal Caribbean Hotels Ltd v. Barbados Fire & General Insurance Co. and Another; Bank of Nova Scotia v. Royal Caribbean Hotels Ltd. (1992) 44 W.I.R. 81***

Combined Business Efficacy/Officious Bystander Test

Historically, the two major tests for implication of terms by the courts have been described as the officious bystander test and the business efficacy test. Both have contributed to the composite test now applied by the courts. ***Arthur Edmond Dovey v. Bank of New Zealand (1999) N.Z.C.A. 328***

Term Implied By Law

Terms can be implied in a contract largely on the basis of statute. **Sale of Goods Act Chapter 82:30 (Revised Laws of Trinidad and Tobago, 1980)** as amended by **Act No. 11 of 1983 14**.

(1) In a contract of sale … there is an implied condition on the seller that in case of a sale he has the right to sell the goods…

(2) In a contract of sale, … there is an implied warranty that –

(a) The goods are free, and the will remain free until the time when the property is to pass … and

(b) The buyer will enjoy quiet possession … 16(2) where the seller sells goods in the course of business, there is an implied condition that the goods supplied under the contract are of merchantable quality, except that no such condition.

(c) As regards defects specially drawn to the buyer's attention before the contract is made; or

(d) If the buyer examines the goods before the contract is made, as regards defects which that examination ought to reveal.

3.1 Terms of the Contract (I): Business Implications

You have now completed the first part of this course dealing with the law of contract and what elements are needed to create one. You have examined a situation where the parties thought they had completed the contractual process but in reality, their 'contract' was void: it did not exist. You have also looked at the distinction between this and a voidable contract, and an unenforceable contract. You have looked at the contract in more 'global' sense and considered those that may be illegal, either in their creation or in their performance, as distinct from encounter from time to time in the material which follows.

Accordingly, you are now ready to commence a detailed examination of the terms of a given contract. Every contract must have 'terms' and they may range from the most elementary to the highly complex. As an introduction to this important topic of contract law, we will examine them within the context of the business world: the role 'terms' play in employment contracts and in the sale of an enterprise. We will also discuss the relevance of trade usage, business efficacy and previous business dealings.

Critical to any contract are its 'terms'. As we will see in this part of the unit, contractual terms are limitless and can be expressly state without ambiguity or uncertainty, or they can be implied by common law or statute or by trade custom. Let us first examine a category of terms which are referred to as restrictive covenants (in business) and contracts which are in restraint of trade.

3.2 Restrictive Covenants, Contracts in restraint of Trade

Generally speaking and notwithstanding our 'freedom of contract' principle and the sheer volume of commerce in Nigeria contracts freely entered into between willing parties and which are in restraint of trade are against public policy. Many of these 'restrictive' covenants are found in employment contracts, and often manifest themselves as 'non competition' clauses in which an employee may agree with his or her employer as follows:

- not to enter into competition with the employer for a certain period of time following termination of the contract;
- not to solicit the employer's customers or clients either during employment or for a certain period after termination of the contract;
- not to induce the employees to leave the employer's business within a specified period of time after leaving the employment;

- not to disclose confidential information or other aspects of the employer's business to third parties.

In addition to employment contracts, other clauses of the type listed above can be found in contracts for the sale of a business, in contracts between suppliers of goods

services, and solus or 'tied-sales' agreements in which a retailer promises to see only supplier's brand of goods.

Let us briefly summarize the key considerations, which give rise to the fact that trade restraints as listed above are prima facie, void at common law. See Nordenfelt V. Maxion Nordenfelt & Sons Ammunition Co Ltd (1894).

3.2.1 General Considerations

The presumption that restraint of trade contracts are void can be rebutted if it can be shown that they are reasonably in the interests of both parties and the public at large. This reasonableness between the parties depends on whether the person benefiting from the restrictions has some legitimate reason for imposing it (for example, trade interest is protected), and whether it is reasonable for the other person to comply with it. Factors for consideration in the concept of reasonableness include:

- The nature of the restraint (e.g. is an employee prohibited from working in his/her occupation?);
- The time period (one year? Two year?);
- The geographical area. (radius of 2, 10 15 miles, city or state etc)

a) EMPLOYMENT

The employer, when enforcing a restrictive covenant in an employee's contract, must show that it is no wider than necessary to protect that interest. Where a Stockbroker working for the Plaintiff signed a three-year non-competition clause and after 11 months left the firm with about

17 of the Plaintiff's employees, the Judge in an action to enforce the covenant, agreed that the risk of the Defendant setting up his own brokerage was a real one and that the nature of the business was highly personal; however, he ruled that three years was too long and therefore the clause was not enforceable. A similar clause that prevented Ms Buchana from working anywhere in what was then 'the Colony' as a hairdresser for one year, was held void. The Court of Appeal had no difficulty with the time limit but refused to prohibit her from working as a hairdresser in the Colony.

b) SALE OF A BUSINESS

As already noted, in assessing 'reasonableness' within this area of the law, the courts tend to be more strict with contracts formed between two businesses than clauses which attempt to bind employers and employees. Agreements between suppliers to fix prices on goods and regulate supplies are largely regulated by statute, e.g. the

Restrictive Trade Practices Act The legislative thrust in various jurisdictions has been that such agreements are presumed void unless it can be shown that such an agreement is beneficial to both parties and in the public interest.

There is no specific regulatory control of a comparable in Nigeria, and in the case of a dispute, resort would have to be made to the Common Law along the lines of the "reasonableness" test in restraint of trade cases.

As you have already learned, most business agreements are intended by the parties to be a contract and hence binding on them. Difficulties may arise in enforcing a contract when in fact is no 'contract' to start with. And at the end of the last section, you briefly examined some specific contract clause between parties to a contract who wish to restrain the other's trading activity. This now leads us into the two last topics in this unit, the first dealing with trade; the second expanding this material into an overall discussion of contract terms in general and examining various problems which can be encountered.

SELF ASSESSMENT EXERCISE

i) Rauf agrees to pay Edosa N50,000 if Edosa will arrange to have Rauf's brother enter United States of America from Spain without going through immigration control. The brother arrives safely but Rauf refuses to pay Edosa N50,000. can Edosa successfully sue Rauf? Give reasons for your answer.

ii) What general presumptions govern contracts in restraint of trade? Give two examples.

3.3 Trade Usage, Business Efficacy And Previous Business Dealings

You have spent considerable time in assessing given situations, and upon the basis of your understanding of the requirement for certain essential elements, you can establish whether or not a contract exists.

Part of this complicated weave of concepts are the 'terms' which can be expressed in writing or orally. Unfortunately, it is not always easy to identify which term or terms are intended to contractually bind the parties. In this regard, the opinion has been expressed that there is a spectrum, or sliding scale (of terms) rather than a series of recognized categories.

We will study this in more detail in the final section of this unit but you should already be aware that contractual terms differ in importance and may be easily identified in a complicated, ten-page written agreement; but less so in a small cash sale where goods and money are exchanged and in which terms may be virtually non-existent.

In the example of trade restraint clauses entered into between the parties in the previous section, such clauses are clearly ascertainable: A agrees with B that upon termination of the contract, B will not solicit A's clients for a period of one year, within a geographic

area of five miles of the premises. And if the parties in their business dealing express in writing that:

'This agreement is not entered into, nor is this memorandum written, as a formal or legal agreement and shall not be subject to legal jurisdiction in the law courts either of the United States or England… Then the courts may well, as the House of Lords did, in ***Rose and Frank V. Crompton (1975) (supra)*** rule that the parties clearly intended not to be contractually bound. Interestingly enough, the parties there had also agreed that their lack of intention to be legally bound was partly based on their past business dealings with each other, thus taking into account that the courts, in the absence of an express term, will imply a term in at least three situations:

a) trade usage;

b) business efficacy;

c) previous business dealings.

3.3.1 Trade Usage

Terms may not necessarily be incorporated into a contract, and although not expressed by the parties, the courts will sometimes acknowledge a given custom or common practice in a particular industry or trade. In British Crane Hire Corporation Ltd V. Ipswich Plant Hire Ltd, (1975) the hirer of an earth-moving crane, on the basis of trade convention or custom, was held liable for the salvage costs when it sank in marshes., no express agreement on this aspect of the contract had been entered into, in writing or orally.

For the courts to take due notice of particular custom in a particular trade or industry, it must clearly be shown that:

a) the custom being relied on is well established, certain and reasonable;

b) everyone in that industry would intend that such an implied clause was to apply;

c) it may not contradict any existing legislation;

d) it will bind a party who is unaware of such custom or trade usage; In other words, if the custom is well-known to 'everyone' in the trade, 'constructive' notice (in which one is deemed to know a certain fact, even if that is not the case) will apply as distinct from 'actual' notice. From time to time in this course, you will encounter the concept of constructive notice, which basically says in law that if you are ignorant of a particular piece of knowledge, that will not help you if you ought to have known about it. Hence, some of the cases you may read will assert that the 'defendant knew, or ought reasonably to have known' In company law, you will encounter constructive notice with respect to documents which are registered, say in the Companies Registry. As they are in the public domain, you are deemed to have read them even if you have not.

That said, you will learn that the concept in this latter regard has been abolished or extremely modified by the Companies and Allied Matters Act, 1990.

3.3.2 Business Efficacy

This arises where the courts in a business dispute attempt to give the 'desired effect' to a term in a contract which is not explicitly stated or is completely absent. Does this error or omission render the contract nonsensical from a commercial standpoint? In the Moorcock (1889) the owners of a docking wharf on the River Thames agreed to berth there for the purpose of unloading its cargo. Both parties knew the vessel would be grounded at low tide but the owners of Moorcock were not aware that in addition to mud and silt on the river bed, which they accepted, there were also exposed rocks which ultimately damaged it.

The contract did not refer to this contingency. The ship owner successfully sued the wharf owner on the basis of business efficacy; that it was implied in the contract that the river bed would be safe, at least to the extent that reasonable care could be provided.

3.3.3 Previous Business Dealings

You will recall that in the ***Rose and Frank V Compton (1975)***, the parties were saying that partly as the result of their past business dealings with each other, they did not intend their agreement to be legally binding. The reverse of this is where past business dealings between the same two parties will be implied. Hence, if A and B have for the past five years dealt with each other on particular terms but for some reason, one or more of the terms is omitted from the present contract, then in appropriate cases, the courts will enforce it by implication. In ***Hillas & Co. Ltd V Arcos (1932) 147 LT. 505*** a purchase and sales of timber contract between the parties referred to '22,000 standards of soft wood (Russian) of fair specification over the season 1930'. An option clause also allowed the plaintiff (buyer) to take up to an additional 100,000 standards in 1931.

Despite the rather inexact specification, the parties bought and sold the timber during 1930, but when the plaintiffs exercised the 100,000 option, the defendants refused to deliver as the specification was too vague to bind the parties. The House of Lords held in favour of the plaintiffs, stating that although the specification was to a certain extent vague, the parties encountered no serious difficulty in carrying out the 1930 order and there was no reason to believe the option for 1931 could not be similarly carried out.

You will note that the concept of 'previous dealings' between the parties may also be a deciding factor in the case of exclusion or exemption clauses in which one party may

enforce a term in a contract in which he or she is attempting to exclude or limit in some way liability for a breach in that contract.

4.0 CONCLUSION

This unit marks the beginning of our discourse on 'terms' of a contract. Because it is not possible to provide for every situation, other business relationship between parties have to be considered when interpreting the intention of parties to a contract. Hence such matters of business implication, Trade Usage and business efficacy among others, which you have learnt in this unit. It is better that the contract succeeds than it perishes.

5.0 SUMMARY

We have discussed terms of a contract where parties are unequal, the court may sometimes restrictive covenants in contracts.

6.0 TUTOR-MARKED ASSIGNMENT

1) 'The courts will on occasion acknowledge a particular trade custom as being an implied term of the contract': The British Crane Hire case. Comment on this statement and outline the tests the courts apply when establishing 'trade usage' or 'common practice'.

2) Bee-Bee, an importer, enters into a one-year contract with Chukwu, who operates a games outlet in Awka which state the following: Bee-Bee agrees to supply to Chukwu for a one-year period commencing January 1, 2006 to December 31, 2006 inclusive, five hundred boxes of assorted widgets for a total sale price of N500,000. And provided further that Bee-Bee shall have the option to purchase a further one thousand (1,000) boxes of widgets on or after January 1, 2007 for a further period of one year, provided that such notice to exercise the option shall be made on or before that date'.Bee-Bee provides Chukwu with five hundred boxes of widgets through 2006 and Chukwu, on December 30, sends written notice to Bee-Bee that he wishes to exercise his option to purchase the 1,000 boxes of widgets. Bee-Bee contracts Chukwu and says: 'No delivery. The agreement is too vague. What the devil is a widget?

Is Bee-Bee obliged to complete the order? Give reasons for your answer.

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UNIT 2 TERMS, CONDITIONS, WARRANTIES AND OTHER CLAUSES

CONTENTS

1.0 INTRODUCTION

You have learned the importance of the terms in a contract and that without them, there is no contract. The parties then must agree on something, whether it be a simple 'goods/cash and carry' transaction or a complicated 20-page technology transfer agreement. The law acknowledges that no one is perfect, and even the parties to a contract

who are very clear and precise as to what each is agreeing, may well find themselves in dispute over a particular clause. This final material studies this in further detail and expands upon the business implications of terms which you encountered in the last section.

2.0 OBJECTIVES

At the end of the Unit, you should be able to:

- understand the essence of terms in a contract
- differentiate between conditions and warranties
- identify appropriate remedy in each perbanler breach

3.0 MAIN CONTENT

3.1 Express Terms

Here is an excellent example of express terms. NOU Electronics orders a computer-testing machine for N20 million to be delivered on July 1, 2006; both the price and the delivery date are clearly express terms. In addition, Omatek also undertakes to install the equipment and train the staff. If Omatek fails to deliver until July 3, can NOU Electronics successfully bring an action against Omatek? In general terms, the answer to that is "yes", as Nou Electronics will argue that the delivery date was an express term and hence Omatek was in breach of their contract. However, Omatek may well argue that being two days late is not critical to the overall intent of their agreement, and is a mere warranty that does not substantially effect the sale and purchase o the machine.

So this raises the first issue: Did the express term (delivery July 1) go to the very heart, or 'root' of the contract? Nou Electronics will argue 'yes' in which case what is its remedy? Assuming its position is correct, that it is a condition, then its remedies are rescission and a claim for damages.

What is a two-day delay in delivery worth? We will study the courts' approach to this later. Meanwhile, Omatek will of course argue that being two days late is no big deal, a warranty entitling Nou Electronics to damages, but not rescission. Both parties of course have their own viewpoint and by now, you should also be forming your own opinions in these cases.

However, this is academic as Nou Electronics has accepted delivery of the equipment, which would still not prevent it from making a claim based on the delay. But now, the second issue is that Omatek has neglected to install the machine and train the staff, a delay which ran from July 2 to October. During this time, Nou Electronics presumably lost considerable business revenue. Now what is the measure or quantum of Nou Electronics' potential damages? Moreover, is Omatek assuming that he does finally complete his contractual obligation, entitled to something for his efforts?

You have then, in this relatively simply, hypothetical scenario, at least four issues: conditions, warranties, partial performance and remedies all of which we will examine in due course.

In summary then, although, it is relatively simple to identify an 'express' term ('delivery date, July 1' and 'sale price, N20 million) the parties may well have differing views on the impact that a breach of such a term has on the contract. And if that is not bad enough, what about contracts where the terms are not so clear, not 'express', but implied?

Therefore, let us turn to the subject of implied terms in common law and by statute.

3.1.1 Implied Terms By Statute, Common Law And The Courts

In the world of commerce, it should be noted that terms of a contract, even if not expressly stated by the parties, may be implied by a Common Law principle such as trade usage, as in the British Crane Hire Corporation case we mentioned in the previous section. In addition, in some areas, there has been statutory intervention in which certain trade practices have been codified, as for example in Sales of Goods Act. In this Act there are four 'consumer' sections in which certain terms by implication are an integral part of every contract of the sale of goods to a consumer:

- Part A – the seller has the right to sell goods.
- Part B – the goods correspond with the description
- Part C – the goods are of merchantable quality.
- Part D – in sale by sample, the bulk of the goods will correspond to the sample and the buyer will have a reasonable opportunity to compare the bulk of the goods with the sample and check that the goods will not be unmerchantable.

In these four instances, the consumer enjoys protection to the extent that even though the seller has made no representations (examined in unit 3) regarding ownership of the goods, their description, their merchantability and their corresponding to a sample, these aspects are there by implication, and by the Sales of Goods Act. The retailer cannot exclude them in a typical sale.

The sale of goods is an integral part of commercial law and space precludes us from pursuing this aspect in any detail. However, you should be aware that the 'protection' we have referred to varies in accordance with the relationship and status of the parties: the sale can be a consumer sale as between the retailer and the consumer, or it can be between two private individuals, or between the wholesaler and the retailer. Consequently, in some instances it may be possible to exclude the provisions of the Sales of Goods Act; for example, in a wholesaler/retailer transaction, provided it is fair and reasonable. This will be examined at the end of the unit. And in a private seller/private buyer transaction, only the right to sell and sale by description are implied.

At common law, commercial practice has led to the evolution of these and many other terms which are implied in a myriad of relationships, of which we will name only three:

The bank/customer relationship – both parties have implied duties to each other, particularly the bank's obligations to the customer.

b) Employment contracts – the employer is obliged to provide safe working conditions for the employees, among others, and it is implied that the employee will use reasonable care and skill in the execution of his/her duties.

c) The landlord/tenant relationship – it is implied in the relationship between the parties that the premises 'are reasonably fit for human habitation'.

Finally, you have learned that the courts may imply terms into a contract which is in dispute. We refer to the consideration of trade usage, business efficacy and previous business dealings, which you encountered in the last section.

Do not forget that although this section has talked about 'statute' and 'common law' as though they are distinct entities, nothing could be further from the truth. In the 'real world', in employment, for example, there is a subtle blend of these two leading components of English law.

In facing an employment dispute, reference will have to be made to both the labour law and common law principles, many of which will not be found in the Act.You have already learned that in examining a company's director's conduct, recourse will again be necessary to the common law as the Companies & Allied Matter Act may not necessarily provide the guidance you need.

It is now time to turn our attention to some of the issues raised in hypothetical Nou Electronics case, in which, among other things, we were trying to assess the importance of the delivery date of the equipment on July 1. This leads us into the next topic of this unit.

3.2 Conditions, Warranties And Innominate Terms

You have two broad principles to consider from the materials you are about to read: how do we distinguish between terms in a contract which go to its 'root' as distinct from those that do not. Once that problem has been solved and one party to the contract to a greater or

lesser degree is at fault, what remedies would a court of law award to the injured party? You will not be surprised to learn that these questions are often not easily answered. Consider therefore the situation in two old English cases which illustrate these complexities.

In ***Bettini V Gye (1876) 1 Q.B. 277***, the plaintiff was contractually bound to sing with the defendant's company from March 30 to July 13, 1875. There was no scheduled programme for the plaintiff but she agreed to be in London six days before March 30 in order to rehearse. Illness prevented

her from being there and the defendant refused her services although she could have completed the schedule. The plaintiff succeeded as the court decided that the failure to attend rehearsals did not go to the root of the contract.

In another case involving a singer, ***Poussard V. Spiers & Pond (1876) 1 QBD 410*** the plaintiff's wife was hired by the defendant to play in an opera beginning November 14, 1874 for three months. The plaintiff's wife attended the rehearsals but was too ill to attend the gala opening on November 28. The Defendant used an understudy for that night and until December 15. The Plaintiff's wife said she was fit to resume singing on December 4, but the defendant refused to accept her services. The court held that the plaintiff's wife had breached her contract and that the defendant was justified in terminating her services.

Thus in both cases, the plaintiffs had breached their obligations to the defendants, but in the first it was a breach of warranty; in the second, it was a breach of condition, and hence much more serious. What effect then does a court ruling on these points have on the respective remedies awarded the successful party? These can be summarized as follows:

a) Breach of a condition of a contract entitles the injured party to rescind or terminate the contract, or alternatively, continue with the contract and sue for damages for any loss that might have been suffered.
b) Breach of a warranty does not entitle the injured party to rescind or terminate the contract but merely sue for damages for any loss suffered. As you can see, it is important to distinguish between a condition and a warranty as it has a considerable effect on the remedies which are available in the event of breach. Sometimes it is easy to make this distinction by the phrasing of the terms, or the nature of the parties' conduct. But in the complex commercial world, undertakings between the parties are so inter-related that the seriousness of a breach can only be assessed after the breach has occurred.

The modern judicial view on this difficult point of law is that it is meaningless to try to 'slot' terms of a contract into 'conditions' and 'warranties' even if the parties describe them as such, as to do so may lead to a party being awarded an inappropriate remedy. Consequently, in some cases, the judges have ruled that despite terminology it is easier to consider the consequences of the breach rather than the significance.

In this regard, now consider the following.

3.3 Innominate Terms

Suppose as a contract, the seaworthiness of a vessel was an issue. Part of the contract said the owners would 'maintain her in a thoroughly efficient state in hull and machinery during service'. The hirer of the vessel did not have continuous use of the

ship as it had to be docked and was not seaworthy for about 20 weeks. The plaintiff owner would be in breach of the clause but the Defendant hirer would not be allowed to terminate the contract, as it was not a condition that had been breached.

The test put forward by Lord Diplock was that if the innocent party has been deprived of most of the benefit he/she expected to get from the contract, then it is a breach of condition; if that is not so, then it is a breach of warranty. Terms subjected to this test are known as 'innominate' terms, and unless a term is clearly a condition or a warranty, the contract must be looked at in its entirety and a court will ask the questions that Lord Diplock asked.

At this juncture let us briefly examine three types of contract clauses, which are common in today's business world: conditions precedent, conditions subsequent, and exclusion or exemption clauses. Before we do this, complete this exercise.

SELF ASSESSMENT EXERCISE

Distinguish between a condition, a warranty and an 'innominate' term.

3.4 Conditions Precedent And Subsequent

In the previous section of this unit, you studied an important distinction between conditions and warranties in a contract and the subsequent development of the courts in awarding remedies in the event of breach.

In this regard, you have briefly considered this judicial approach in the formation of innominate terms. Now we will encounter two forms of conditions which, are not conditions at all and are not a term of the contract: conditions subsequent and conditions precedent. These are conditions independent of the contract and influence its very existence. Put simply, a condition precedent is a happening or event, agreed upon between the parties, by which there is no contract unless the stated happening or event occurs.

Often the later will involve the parties obtaining some form of approval or licence as in Pym V Campbell (1856), where the Defendants agreed to buy a share in an invention owned by the Plaintiff. They further agreed that their agreement would not be binding unless the invention was approved by the Plaintiff's engineer. It was not approved and the

Defendant's action against the Plaintiff failed as their agreement to obtain the approval was a condition precedent and hence there was no contract. This is a much more clear-cut situation than where the parties are negotiating a contract and say, 'Let's work out the details if we get our licence. Then, if the licence is granted, they must still agree as to the contract terms.

On the other hand, a condition subsequent occurs when an existing contract is in place but will cease to bind the parties or allow one party to rescind, if some happening or even occurs. In ***Head V Tattersall, (1870)***, it was agreed between the parties that if the horse, the subject of

the contract, did not meet expectations within a certain period of time, it could be returned to the owner. The horse did not meet its contractual description and was successfully returned to the seller. Another example could be an employment contract in which the employee is employed on the basis of a condition subsequent that he passes his engineering examinations. If he fails, then the employer can treat the contract as terminated

4.0 CONCLUSION

A term may be a condition or a warranty; express or implied. A condition is very important and a breach may entitle the other to rescind the contract. A breach of a warrant entitles the other only to damages.

5.0 SUMMARY

We have discussed the essence of terms; conditions, warranties, innominate terms. We differentiated between condition precedent and conditions subsequent, with illustrations. It does immense good to replicate this.

6.0 TUTOR-MARKED ASSIGNMENT

Write short notes on each of the four implied consumer rights under the sales of Goods Act.

7.0 REFERENCES.FURTHER READINGS

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UNIT 3 Exclusion (Exemption) Clauses

CONTENTS

1.0 INTRODUCTION

Freedom of contract is a judicial concept that contracts are based on mutual agreements and a result of free choice unhampered by external control. It implies that parties to it have the right to bind themselves legally. They equally enjoy the right to insert what clause or clauses they please exempting themselves from liability from one breach or another or even from a total breach. Problems often arise where one party lay failed to avert his mind to such clauses, or where the clauses are sudden or in standard form contracts and this is what we are about to learn.

2.0 OBJECTIVES

When you shall have read this unit, you should be able to:

• Understand the circumstances under which one party to a contract may seek to escape some obligations in certain events.

• Demonstrate an understanding of the governing rules.

3.0 MAIN CONTENT

3.1 Exclusion (Exemption) Clauses

The principle of freedom of contract assumes that within reason, the parties are able to negotiate freely any terms they may deem fit. As we have stated before, this may not be possible if one party has far stronger bargaining power than the other; for example,

one party in the sale of goods may have a monopoly over the supply of those goods, or financial institution may impose an excessive rate of interest on a loan where the borrower is in serious financial trouble. In these examples, it can be argued that there is no genuine bargaining and it is quite common for us to be obliged to sign 'standard form' contracts which we are obliged to accept as they stand. Within this background, contracting 'exemption' clauses) in which one party attempts to limit or totally exclude liability if something goes wrong in the contractual relationship.

This topic is another prime example of the blending of common law rule with subsequent legislation. In their simplest form, exemption clauses are everywhere: on laundry and parking lot receipts, on transportation slips (ships and buses), and on chairlifts which take you to the top of a mountain peak. Hence, in common law, there is a long line of so-called 'ticket' cases. These are typified by situations in which the courts assess whether or not, among other things, a passenger on a ship (perhaps injured by a crew-member's negligence) is entitled to recover damages from the ship owner who claims 'protection' by an exemption clause on all passengers' tickets.

3.2 The Common Law Approach

In ***Olley V. Marlbrough Court Ltd (1949) 1 KKB 532***, a Mr. and Mrs. Olley checked into the defendant's hotel. In their room was a notice excluding the Defendant's liability for loss of guests' belongings. Some of the Olleys' personal goods were stolen by an employee of the Defendant, who pleaded the exemption clause. The argument failed as one of the common law principles state that the clause must be incorporated into the contract. This was not the case here as the contract between the Plaintiffs and the Defendant had been made at the front desk when the Plaintiffs registered. From this often confusing array of cases, the broad common law principles upon which exemption clause are based can be outlined as follows:

a) A person is bound by the terms of the contract he/she sign, even though he/she has not bothered to read them, unless there is some vitiating element. See ***L'Estrange V f Graucob Ltd (1934) 2 KB 394; DC***, where the clause was "regrettably small print.

b) The exemption clause must be incorporated into the contract at the time the contract is made.

c) Reasonable notice of the exemption clause must be given to the other party. The party relying on the clause has the burden of establishing that he/she took such reasonable steps to draw it to the other's attention: Parker V South Eastern Raily C., (1877)

d) It is difficult for a plaintiff to set aside an exemption clause if there has been a history of past dealing between the parties; (that is, there ha been some form of continuing relationship and this relationship is a question of fact).

e) Broadly speaking, the common law approach is that the clause is effective if the party relying on it can show that it was incorporated into the contract, the other

party relied on it and it was clearly worded. Let us now examine statutory intervention to the common law in Nigeria

3.3 The 'Reasonableness Test'

As you have already learned, the common law is still important even if an Act has been passed, sometimes to 'tidy up' uncertainty which may arise in judicial precedent. Two types of contracts have to distinguished.

1) Contract between a business and a consumer, or private customer; and

2) Contract between a business and a business. Note that transactions may occur between two individuals dealing with each other privately outside the business world, but we will not deal with this in this section of the unit.

3.4 Exclusion Clauses And The Consumer

In the event of a dispute between a business which is relying on an exclusion clause, and the customer, reasonable test applies which is essentially a restatement of the principles found in common law cases. It takes into account, among other things, the following:

a) the strength of the bargaining power of the parties, including alternative means by which the customer's requirements could have been met;

b) whether the customer was induced into accepting the term or whether he/she had an alternative choice to enter into a similar contract with another business;

c) whether the customer knew or reasonably ought to have known of the existence and extent of the term, having regard, among others, to trade custom or a previous course of dealing;

d) whether the goods had special features which were there at the request of the customer.

In a contract, for example, involving a cargo, receipt of the cargo carrier of the seller who shipped frozen chickpeas by lorry. The issue may arise whether the clause extended beyond the goods themselves to the lorry carrying the goods. If the latter were the case, then the above guidelines would be applicable. If the seller had no control over the transportation, which was the purchaser's own lorry, then the exclusion would be careful with the word 'consumer'. We are all consumers in the generally accepted meaning of the word.

A party to a contract 'deals as consumer' in relation to another party if:

a) He neither makes the contract in the course of a business nor holds himself out as doing so;

b) The other party does make the contract in the course of a business; and

c) In the case of a contract governed by the law of sale of goods the goods passing under or in pursuance of the contract are of a type ordinarily supplied for private use or consumption.

A statute may define 'consumer' in its own terms and confer varying degree of protection. In addition, the 'reasonableness' test will apply in the situations many of us encounter in our daily lives: dropping a suit off at the laundry, parking a car having it serviced, and checking into a hotel, to name a few.

SELF ASSESSMENT EXERCISE

i. What is generally the purpose of exemption clauses in contracts?

ii. In what circumstances are since clauses enforced by the courts?

3.5 Exclusion Clause And Business Parties

As you are aware, many business contracts (that is, between two business parties) are executed on standard forms and sometimes on a 'take it or leave it' basis. The law also acknowledges that parties who contract in this manner are to be differentiated from those who negotiate and draft their own 'tailor-made' requirements. It is more likely, then, that in a standard form contract, there may well be unequal bargaining power between the parties; consequently, as you saw in the guidelines, the weaker party is afforded some protection.

Also of significance is that a person cannot completely exclude or restrict his or her liability for negligence insofar as the clause in question complies with the reasonableness test. It should also be pointed out that under no circumstances can a party, by an exemption clause, exclude potential liability for death or personal injury. However, clause which attempt to exclude liability for financial loss or property damage will be subject to the reasonableness test.

In ***Photo Production Ltd V. Securicor Transport Ltd. (1980) A.C. 827***, the Plaintiff's factory was burned down as the result of the negligence of an employee of the Defendant security company. The House of Lords held that the Defendant was protected by the parties' exemption clause even though the employee setting fire to the premises constituted a fundamental breach of their contract.

This approach was cited in a recent Ontario case of ***Fraser Jewelers (1982) Ltd V. Dominion Electric Protection C. et al (1997)*** in which the defendant, also a security firm, had contracted with the Plaintiff jeweler to maintain a protective burglar alarm system on its premises. The exemption clause limited the defendant's financial liability for loss, damage or injury sustained by a failure in the service or equipment. The premises were robbed and the Defendant's employee did not respond quickly enough. The Plaintiff claimed the CDN$50,000 loss it had suffered. The Ontario Court of Appeal ('OCA') held that the exemption clause was binding between the parties and the Defendant was not liable. As another example of how cases are argued in court, we will review the arguments presented by the Plaintiff's lawyers and the Court's ultimate response. You will spot several references to legal issues which you are studying.

A) The Plaintiff argued

a) It had not read the agreement.

b) The exclusion clause had not been pointed out to it.

c) The failure of the Defendant's alarm system was a fundamental breach of their contract.

B) The Court of Appeal's response was

a) A fundamental breach must, among other things, serve to substantially deprive the Plaintiff of the benefit of the contract. No such breach occurred as the parties had dealt with each other for two years and worked with each other right up to the trial.

b) As business executive signing an agreement is presumed to be aware of the terms therein and intended the company to be bound (L. Estrange V f Graucob Ltd)

c) The language of the exemption clause was clear and unambiguous. It should be, prima facie, enforced according to its true meaning and seen in the light of the entire agreement, not to be unacceptable commercial practice.

d) That the parties may have a different bargaining power does not in itself render an agreement unconscionable or unenforceable and entitle the party to repudiate the contract.

4.0 CONCLUSION

Parties are free to enter into whatever bargain they please and product themselves. The court may not interfere if parties are equal, and may where one party is in a stronger negotiating position. It is important that the document containing the exclusion clause must be a contractual document. It is not an excuse that the document was not read, provided it has been signed by the party. Where it is not signed, he has to be put on notice. Ambiguity in an exclusion clause interpresated against the party relying on it. A stranger cannot take advantage of an exclusion clause.

5.0 SUMMARY

In this unit you have learnt about the Common Law, statutory and Judicial approach to exclusion (exemption) clauses. We have referred to the case of ***Olley V. Malborongh Court Ltd (1949) IKB 532,*** *see the following cases* ***Chapelton V. Barry (1940) I KB 532,*** and the Nigerian cases of ***Akinsanya V. UBA (1986) 4 NWLR (Pt. 35) p 273*** and ***Narumal Ltd V. Niger Benne Transport Corp (1989) 2 NWLR (Pt. 106) 730 at 751-54***. We hope you will be able to identify the reasoning of the court in each case.

6.0 TUTOR MARKED ASSIGNMENT

Deolu pays N100 as entrance fee at the turnstiles of Eko Private Park, which is a mini-zoo. He is strolling along ten minute later when an aggressive monkey escapes from its compound and bites him severely on the leg. A park keeper has negligently failed to

lock the gate after feeding the inmates. There is a framed notice on the compound exempting the park authorities 'from any and all injury caused to visitors whether attributable to its negligence or not'.Can Deolu successfully sue Eko's Private Park for the injuries he sustained as a result of the park's negligence?

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MODULE 4 TERMS OF CONTRACT

UNIT 5 REPRESENTATION

CONTENTS

1.0 INTRODUCTION

A representation is a statement made by one party to the other before or at the time of contract, with regard to some existing fact or to some past event, which is one of the causes that induced the making of the contract. It follows from this definition that a statement is not a representation if it is one of law, opinion, intention or of future event. Nor is a representation material if it does not induce a contract, for example, if the party to whom it is made (the representee) did not believe it, or ignored it, or did not hear or understand it, or forgot all about it.

2.0 OBJECTIVES

At the end of this unit you should be able to identify what statement amount to representation in a contract.

You should also know what the effect of representation is in a contract.

3.0 MAIN CONTENT

3.1 Representation & Terms

A representation does not induce a contract if the representee afterwards make his own investigation to test the truth of the statement, ***Attwood v Small (1838) 6 C1. And Fin. 232***. However, a representation induces a contract a contract if, though given an opportunity to test its veracity, the representee does not utilize that opportunity, ***Redgrace v. Hurd (1881) 20 Ch. 1; Sule v Aromire (1951) 20 N.L.R. 20***. But as long as a representation is one of the factors that induce a person to enter into a contract, it is immaterial that there were other including factors as well. Thus, in ***Edginton v. Fitzmaurice (1885) 29 Ch. D 46***, the plaintiff was induced to tale debentures in a

company partly by misstatement in the prospectus and partly by his own incorrect belief about how the debentures would be secured.

Not everything that's said during the negotiations for a contract end up being actual terms of the contract; some information only amounts to a representation. Suppose you buy a car from a second-hand car dealer. He tells you the car has alloy wheels. You buy it, but you later discover the wheels aren't alloy, and they are starting to rust. If the car having alloy wheels was a term of the sale contract, then clearly the dealer has breached the contract and you can sue him. But if it was just a representation, you might have more difficulty suing him. Remember, if it's a term, the buyer always wins and always gets damages!

These four factors can help us distinguish between a term and a representation:

Relative knowledge: Does one party have expert knowledge of the subject matter? In our example, if a car dealer tells you something about a car, it's more likely to be a term; but if you tell the dealer something, it's more likely to be a representation.

Reliance: Did one party obviously rely on what was said when they entered into the contract? If you were particular about wanting a car with alloy wheels, if you told the dealer that and if you made it clear you were buying the car because of its alloy wheel-then it's more likely to be a term of the contract.

The strength of the statement: If it's strong, it's more likely to be a term (unless both parties understood that it wasn't!). In one well-known case, the seller said, "there's no need to inspect the horse, I assure you it's a good horse". That's a pretty strong statement, and the court held it to be a term of the contract.

Timing: Did the statement immediately precede the making of the contract? If the seller said "this car has alloy wheels" and you immediately said "I'll buy it right now", then the alloy wheels are more likely to be a term of the contract.

3.2 Exemption Causes And Unfair Terms

Sometimes a party to a contract will include a term designed to exclude or limit his liability in the event of a breach of contract. Such a term might read "X plc is not liable for any property damage however caused", or X plc will only accept liability up to the amount of £50". This might be a problem if one party is, for example, a big company, and the other is an ordinary customer: the parties have unequal bargaining power, so the stronger party might be able to take advantage of the weaker party. The law does its best to level the playing field here. If a party is trying to rely on an exemption clause, they have to show that the other party specifically agreed to it at the time the agreement was reached. We also have the **Unfair Contract Terms Act 1977**, the main provisions of which are:

You can't exclude liability for personal injury which results from your negligence.

Exemption clauses have to be reasonable. It the court thinks the term in question is unreasonable, that term will be void. You can't exclude liability for defective goods supplied to a consumer (that it, a non-business user). Contracts can't be altered unilaterally, i.e. without the agreement of the other party. In case you're wondering what 'reasonable' means here, that Act actually tells us that: the term must be "a fair and reasonable one to be included having regard to the circumstances which were, or ought reasonably to have been, known to or it in the contemplation of the parties when the contract was made". Clear as mud? Again, it comes down to making a judgment on the specific facts of each case.

3.2.1 Conditions

Conditions are terms that that are considered to be critical to a contract, the breach of which may entitle a party to terminate the contract and seek redress from the courts. ***Poussard v. Spiers and Pond (1985-76) L.R. 1 Q.B.D. 410.***

Warranties: Warranties are generally considered to be terms that while of importance in their own rights does not destroy a contract cannot be terminated by the injured party. ***Ter Neuzen v. Korn (1995) 3 S.C.R. 674***

Exemption Clause: It is now common in contracts to see a party seeking to limit or remove liability with respect to particular aspects of that party's performance of its contractual obligations. A party relying on an exemption clause that limits or excludes liability must from the start demonstrate that the clause is incorporated in the contract (by signature, notice or course of dealing) governing his performance of the contract and that it provides protection against the consequences of the breach of contract for which he is accused. Unfortunately if these considerations are established in favour of the person in breach, there are still several hurdles that must be overcome in order to establish the operability of the exemption clause. The law of exemption clauses has been revolutionized by Unfair Contract Terms Act, which precludes exemption clauses which purport to exempt liability for personal injuries caused by someone acting negligently. Further, where damage has been caused to property excluding liability on the party of a negligent party, this can only be relied upon where notice of the exemption clause has been reasonable. ***Roger Rahamut and National Insurance Property Development Company Limited v. Airport Authority of Trinidad and Tobago H.C.A. No. S-732 of 1995***

3.3 Contract Term And A Mere Representation

The remedy available between a term of the contract and a mere representation when a breach occurs is an important distinction in the two terms. In a contract, a breach of the terms will entitle the aggrieved party to sue and obtain a remedy in damages. The party aggrieved may also obtain remedy of both damages and repudiation of the contract.

Where there is a mere representation, there is no real remedy, but the aggrieved party can bring an action for misrepresentation. Misrepresentation can be made fraudulently or innocently. It can also be made negligently.

Misrepresentation is fraudulent where a person deliberately told a falsehood, which induces the plaintiff to enter into the contract, and the remedy will be in damages. At common law, there is no remedy for innocent misrepresentation, but there is some remedy in equity. The decision in ***Hedley Byrne & Co. v. Heller and Partner (1964) AC 465; Agbonmgbe Bank Ltd v. C.F.A.O Ltd., (1966) 1 All NLR*** which was applied to the same situation involving negligent misconduct, created 'negligent misrepresentation' as a third category of misrepresentation known as negligent misrepresentation. The House of Lords held that in certain circumstances, damage could be obtained for negligent misstatements. In the case, Hedley Byrne, a firm of advertising agents, who had placed orders for £8000-£9000 on behalf of a client, wanted to know whether the company, Eastpower, was credit-worthy and they ask their bank. The **National Provincial Bank** to find out. The National Provincial Bank got in touch with Hellers and Partners and informed 'in confidence and without responsibility on our part' that Eastpower were good for £10, 000 per annum on advertising contracts. Relying on the statement, Hedley Byrne placed further orders on television and in newspaper on behalf of Eastpower Ltd. and as a result, lost £17, 000, when shortly thereafter, Eastpower went into liquidation. The Court of Appeal held in the circumstances that the respondents owned a duty of care to the appellant and these had been a breach of this duty by negligence applicable in preparing the financial report. The court laid down the principle applicable to negligent misstatement thus:

> ***"If in the ordinary course of business or professional affairs, a person seeks advice or information from another, who is not under contractual or information from another, who is not under contractual fiduciary obligation to give the advice or information, in the circumstances in which a reasonable man so asked would know that he was being trusted, or that his skill or judgment was being relied on, and the person has chosen to give information without clearly so quantifying his answer to show that he does not accept responsibility, the person relying on accepts a legal duty to exercise such as the circumstance require and for a failure to exercise that care, an action for negligence will lie if damage result".***

To determine whether a statement is a term or mere representation will depend on:

(i) The stage of the transaction the crucial statement is made, statement made at the preliminary stages of the negotiation would not be regarded as a terms of the contract, but mere representations:- The test is not consistent. In ***Routeledge v. Mckay (1954) 1 WLR 615*** the court held that the statement was a mere representation.

(ii) Where the oral statement was later reduced into writing. The connection is that where there was an oral agreement, which was subsequently reduced into writing, any terms

contained in the oral agreement not contained in the written document will be regarded as a mere representation.

(iii) Where the person who made the representation has special or superior knowledge, skill as compared to the other party, the statement is to be taken as a term of the contract. Conversely, where a person with less knowledge makes the representation, it is regarded as a mere representation.

Some judicial decisions had thrown some light on the way of distinguishing mere representation from the 'term' of the contract. For instance, a statement will not be regarded as a term of the contract if the person who made the statement requires the other party to verify the truth of the statement. This is illustrated in ***Ecay v. Godfrey (1947) 80 LI. L Rep. 286***. In this case, a seller of a boat said it was sound but advised the buyer to examine it. The court held that the advice negative any intention to warrant the soundness of the boat. In another case of ***Shawel v. Reade (1931) 21. R. 81 see all Bannerman v. White (1861) 10 CB. 844***, the plaintiff wanted to buy a horse for breeding purposes and started examining the horse for sale. The defendant interrupted him saying 'You need not look for anything' the horse is perfectly sound'. The plaintiff bought the horse and three weeks later, he discovered it was not suitable for stud purposes. The court held that statement was a term of the contract.

3.4 The Nature Of Contractual Terms

The nature of the contractual terms differs from one contract to the other and they are not of equal importance. A term may be of major importance and any breach could lead to a discharge, while other terms may be relatively minor, whose breach could only result in the award of a mere damages. For many years, various terms have been used to represent the various categories of contractual terms and liabilities. The following terms are common:

Condition Precedent and Subsequent

A condition can either be a:

(a) Condition Precedent, that is the *sine qua non* to getting the thing or condition subsequent which keeps and continues the thing. One of the fundamental principles of the law of contract is that the parties must reach a consensus in respect of the terms thereof, otherwise the contract cannot be regarded as binding and enforceable. It was held in ***Tsokwa Oil Marketing Co. v. B.O.N Ltd. Nigerian Bank for Commerce and Industry v. Integrated Gas (Nig.) Ltd. (2000) 8 NWLR (pt. 613) 119***, that where a contract is subject to the fulfillment of certain specified terms and conditions, the contract is not formed and not binding unless and until those terms and condition are complied with. Once a condition precedent is incorporated into an agreement, the condition must be fulfilled before the effect can follow. ***Tsokwa Oil (200) NWLR 11 (pt. 777) 163, Sparkling Breweries Ltd. v. UBN (2001) 15 NWLR (pt. 737) 539 Okechukwu v. Onuorah (2000) 5 NWLR (pt. 691) 597.***

(c) Case, the whole negotiation on the contract connotes that it was made conditional. Exhibit 75 gave terms and conditions to be met and all the parties agreed thereto which discussed the appellants claim. The appellant appealed to the **Supreme Court**. The **Supreme Court** held that the whole negotiation connotes that it was made conditional on Exhibit 75 and the appellant ought to show how it met all the conditions.

Condition and Warranties

There are the oldest terms commonly used. A condition is used in different senses and interchangeably. In the old case of ***Re Lees ex. P. Collins (1875) 10 Ch. App. 167. (1876) 7 QBD 410***, it was said that there were twelve different senses in which a condition can be used. For example, it may be a condition precedent, a condition subsequent, a condition inherent.

A condition precedent occurs where an agreement is subject to the preparation of a formal agreement. Such agreement is not binding until a formal agreement is drawn up and signed.

In ***Pym v. Campbell (1856) 6 E&B 370*** an agreement to buy an invention was made subject to the approval of a third party, an engineer. The court held there was no binding contract until that approval was obtained from an engineer.

A condition may also be a condition subsequent. The unreported the case of ***African Continental Bank Ltd. v. Okonkwo (Unreported) High Court of Bendel State, suit No A/20/80 per Akpovi J*** is illustrative. The defendant applied to the plaintiff for a loan of £20, 000 while his application was under consideration, the plaintiff invited an estate valuer to value the property which the defendant was offering as security for the loan. The valuer charged a fee of a £985 for his services and this was debited to the defendants account when subsequently, the application for a loan was not approved, the defendant refused liability for the valuers fee. The court held that the defendant was right in repudiating liability for the fee.

The judge said that it would be unfair to the defendant to made to pay for the valuation of his property against a loan which was never granted. The term ‘conditions and warranties’ are used as terms into contract and are used for the same purpose. The two terms are clearly distinguished in the Sale of Goods Law where a condition is defined as a stipulation in a contract as repudiated and a warranty as a stipulation, the breach of which may give rise to a claim in damages but not a right to reject the goods or treat the contract as repudiated. In another way, the prescription of remedies for breach of conditions and breach of warranties indicates that a condition is a major term that attracts repudiation and damages, while warranty is a minor term which attracts the remedy of damages only. The interpretation section of the Sale of Goods Edict describes a warranty

as collateral to the main purpose of the contract. A condition is described as a term which goes to the root of the contract.

Whether a term is a condition or a warranty depends on the intention of the parties. A neat illustration of the description of a condition and warranty is found in the contracting cases of ***Poussard v. Spiers (1876) 1 QB 410*** (condition) and ***Bettini v. Gye (1876) 1 QBD 183*** (warranty).

In ***Poussard v. Spiers (1876) 1 QB 410***, an actress was engaged to play a leading part in a French operatta at the beginning of the run. As a result of illness, she was unable to take up her role until a week after the performances had started. In the meantime, the producers engaged a substitute to replace her and she instituted an action for breach of contract. The court held that her failure to appear for her final rehearsal constituted a breach of condition and that the defendants were entitled to treat the contract as discharge.

In contract, in ***Bettini v. Gye (1876) 1 QBD 183*** the defendant entered into a contract to engage the plaintiff as a singer in operas and concert for a period of 3 months. The plaintiff undertook to be in London on at least six days before the commencement of her engagement for rehearsals she, however, arrived two days before the engagement commenced and the defendant repudiated the contract. It was held that the term as to rehearsals was a warranty and the defendant could sue for damages, he could not repudiate the contract. It is noteworthy that the fact that parties have described a term in the contract as a condition is not conclusive, if in fact, it is a warranty.

Innominate Terms

The court have evolved a new term which is a hybrid between a condition and a warranty, the breach of which could lead to either damages or to a repudiation depending on the breach. The court will look at effect of the breach, where it is so devastating as to deprive the injured party of the whole benefit which was the intention of the party, the remedy will be repudiation, otherwise, it would be damages.

The leading case on the innominate terms is ***Hong Kong Fir Shippings Co. Ltd. v. Kawasaki Kison Kaisha Ltd. (1962) 2 QB 26,*** 'the defendants chartered a ship from the plaintiffs for a two years. The vessel was delivered and it sailed from Liverpool to Newport in USA, and loaded a cargo of cool for Osaka in Japan. The engine room staffs were incompetent and the engine was old. The ship broke down and for five weeks the vessel was held up. It was discovered that repairs would be needed for another 15 weeks. The Chartered repudiated the contract. The court found that the ship was not seaworthy, but the breach did not entitle the charters to rescind the contract. According to the court although, there were many other contractual undertakings which could not be identified per se as either conditions or warranties, there were many other contractual undertakings

of such a complex character which could not be categorized as either conditions or warranties, it is this third group of case to the innominate terms belong. In marine contract, the seaworthiness test was an undertaking which is a clause within the third category, so also te issue of roadworthiness in vehicles. The test of substantial benefit applies to this third group. The breach only entitled the charterers to damages but not repudiation of the contract.

The doctrine of innominate terms was again recognized in ***Cahave v. Bremer (1976) QB 44 (1975) 3 All ER 739***, a German company sold 12, 000 tons of United States citrus pulp pellets to be used as cattle food for £100, 000. The contract provided that the goods were to be delivered in good condition, on arrival in Rotterdam from USA, the goods was found with a small proportion of the cargo had become bad as a result of overheating.

The buyers rejected the goods and claimed a refund of the purchase price. The court ordered the sale of the whole cargo which was bought by third party for £30, 000 and resold to the buyer for that price. The **Court of Appeal** held that apart from conditions and warranties, there was a third term, the effect of depended on the gravity of the breach.

If the breach goes to the root of the contract, the injured party is entitled to treat himself as discharged. According to Lord Denning, the task of the court when faced with a breach of contract is to see whether the stipulation breached on its true construction is a condition strictly so called, that is which entitled to treat the injured party to treat the contract as discharged. Secondly, if it is not such that goes to the root of the contract, the other party is entitled to treat himself as discharged so, the court is applying the test to the clause stipulating that the shipment was to be good condition was neither a condition, nor a warranty, but an intermediate term, and since the breach did not go to the root of the contract, the buyer was not entitled to repudiate the contract.

In the interest of certainty, and in the light of recent decision, the traditional classification into conditions and warranties are still relevant and applicable to a large number of situation ***Maredelanto Campania Nariera SA v. Berbau Handel GMbtt (1971) 1 QB 164 (1970) 3 All 125***. Therefore, once a clause in a contract is accepted as condition per se it will remain and cannot be classified under the third category. In Bunge Corporation***, New York v. Tradex Export SA Panama (1981) 1 WLR 711, (1981) 2 All ER 540 HL*** a seller of goods was held entitled to repudiate the sale agreement because the buyer who was required to give the seller at least 15days notice of when a vessel to ship the goods would be ready, gave 13days notice. It was held that the notice as to the date of readiness was a condition, and short notice, even one day was a breach of condition.

It is noteworthy that when a court decides that a breach is either a breach of condition or warranty, the court will examine the quality of the term broken, and in basing it judgment

on this. Whereas, when the court holds that a term is an intermediate term, the court considers the effect of the breach and bases its judgment on it too.

> ***"It must also be borne in mind that where parties stipulate what the consequence of a particular clause in a contract is, the court will accept and enforce it. However, it is not, sufficient to call a clause 'condition' and another 'warranty'.***

It is for the court to classify the terms. Parties may refer to a clause as a condition when on a close examination, it may be warranty or any other terms in particular, in insurance contracts.

Implied Terms

The courts have frequently found it necessary in construing the terms of a contract to assume the existence of certain terms, not expressly included by the parties in order to give the contract what is popularly referred to as business efficiency. ***In Iboma v. Shell Petroleum Dev. Co. (Nig.) Ltd. (1998) 3 NWLR (pt. 542) 493,*** the Court held that there are certain contracts where terms may be logically implied from the express terms of the contract or where no such express words are available, implied terms may be imported into the contract in so far as they do not contradict the express terms of the particular contract. In order to make a contract capable of being performed effectively, there are three ways terms are implied into the contract.

These are:

(i) Terms implied by the custom or trade
(ii) Terms implied by statute
(iii) Terms implied by courts

1. Terms Implied by custom or trade

Terms are implied into a contract by adducing evidence of local custom or trade usage, though such terms have not been expressly mentioned in the contract. The principle was clearly stated in ***Hutton v. Warren (1936) M & W 466 at 475*** by Park B many years ago:

> ***"It has long been settled, that in commercial transactions, extrinsic evidence of custom and usage is admissible to anne incidents to written contracts in matters, with respect to which they are silent. The same rule has been applied t contracts in other transactions to life, in which known usages have been established and prevailed, and these have 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 found, but to contract with, reference to those known usages" Ibid at p 475.***

In the case of ***British Crane Hire Corporation v. Ipswich Plant Hire Ltd. (1975) QB. 303***, the plaintiffs and the defendants were both in the business of hiring out heavy earth-moving equipment. The plaintiffs, in usual practice, sent a printed form of agreement to the defendant for signature. Under the conditions in the printed but unsigned form which was similar to those used by all firm in the crane hiring business, hirers are liable to indemnify the owners against liabilities in the sort of situation that had occurred. The defendant resisted the incorporation of this term into the contract. The Court of Appeal held that the terms had been incorporated, as both parties were in the trade and they knew firms in the plant hiring trade always imposed such conditions in regard to the hiring of plant. Lord Denning stated.

> ***"It is clear that both parties knew quite well that conditions were habitually imposed by the supplier of these machines and both parties knew the substance of these conditions! From this decision, it is clear that a custom is applied only when it has been expressly or impliedly excluded by the contract. Where the usage is notorious, that both parties are either familiar with it or must presume to be familiar with it, an alleged custom can be incorporated into the contract only if there is nothing in the express or necessarily implied terms of the contract to prevent such exclusion. London Export Corporation v. Jubilee Coffee Roasting Co. (1958)2 All ER 411.***

The case of ***Gottschalk v. Elder Dempster & Co. Ltd (1917) 3 WLR 16*** is also illustrative under a contract of carriage of goods by sea, the terms which were contained in a bill of lading. The defendant undertook to consign some packages from Liverpool to the plaintiffs in Lagos. The plaintiffs safely delivered the package to the customs shed on arrival, one of them was missing when the plaintiff took the delivery and he sued for loss.

The plaintiff sought to rely on a custom at the port according to which the defendants would have contained after the discharge of goods. The court held that no evidence of custom can override the terms of written contract. If an alleged custom is not sufficiently well established, as to be known or presumed know to all engaged in the relevant trade, it cannot be applied to a contract in which notice of it has not been given to one of the parties.

In ***Bank of the North v. Poland (1969) 3 ALR 217*** the plaintiffs were bankers in Kano and defendants were Lloyd's in London. There was insurance between the plaintiff and defendant. The effect of the express terms of the policy was to give the plaintiff a right to claim payment in Kano for losses in Nigeria. In challenging the jurisdiction of the Nigerian Court, the defendants denied that they were liable to pay in Nigeria. They adduced evidence to established that by custom and usage of Lloyd's, insurance money could not be paid directly to the assured in Nigeria an can only be obtained payment in London through approved brokers. The court held that the alleged Lloyd's customs or usages were not part of the contract. In the absence of the knowledge of the customs and

assent to them, they could not be incorporated into the contract. It was said Lloyd's customs had not yet acquired sufficient notoriety and general acceptance to be applicable to all transaction with Lloyd's underwriters.

In employment contract, custom and usages have developed extensively. There is a rule that a person who employs a person has the power to terminate his employment where there is no express provision to the contrary. Another rule is that an employee who is paid on a monthly basis is entitled to one month's notice on termination. However, in ***Ahuronye v. University College, Ibadan (1959) WR NLR 232*** it was held that when a servant is engaged for an indefinite period, it is common knowledge that neither the master nor the servant contemplates an engagement for a year certain. It was presumed that the plaintiff was employed on the same term as other employees and the plaintiff employment was determinable by one month's notice.

(ii) Terms implied by Statutes.

Certain statutes imply terms into particular types of contract. This was done to protect the weaker party and in this case, the buyers, in contract for the sale of goods. The **Sale of Goods Edict**, in the **English Sale of Goods Act, 1893/1979** was regarded substantially a codification of the existing common law of sale. Certain sections contain terms which are implied in all contracts as to the title, description, suitability for particular purpose sample and merchantable quality.

Though, each State of Federation enforce its own Edict on sale of goods, the principle of law arising from the interpretation of the provisions of these laws are uniformly applied in all the 36 States of the Federation and the Federal Capital, Territory Abuja,

The implied terms are:

(a) Implied Terms as to Title

The Sale of Goods Edict provides that in a contract of a sale, there is an implied condition on the part of the seller that in the case of a sale, he has a right to sell the goods and in case of agreement to sell, he will have right at the time when the property is to pass **Section 14. of Kaduna State Edict, 1990.**

In interpreting the section, the seller is deemed to give an implied warranty that the buyer shall enjoy quiet possession of the goods **Section 142(a) of Kaduna State Edict, 1990**. Another warranty is that the goods are free from any charge or encumbrance in favour of a third party. Thus in ***Akosile v. Ogidan (1950) 19 NLR 87. See also Roland v. Dival (1923) 2 KB. 500, Niblet v. Confectioners Materials (1921) 3 KB 387*** the defendant bough a car from a European for £3-5 and sold it to the plaintiff for £340. The European was subsequently convicted of stealing the car and the car was removed by the police. The plaintiff brought an action for the recovery of £340 the purchase price from the

defendant. The defendant relied on the doctrine of caveat emptor. The defence was rejected and held not applicable. The court held that the plaintiff was entitled to the refund of the purchase price.

(b) Sales by Description

The Sale of Goods Edict provides that where there is a contract for the sale of goods by description, there is an implied condition that the goods will correspond with the description. **Section 15-Kaduna Sales of Goods Edict, 1990.**

The provision applies where the buyer has not got the opportunity to see the goods and he relies on the seller's description. Thus, in ***Varley v. Whipp (1900) I QB 513*** an old reaping machine was described by the seller as new. The buyer relied on the description and bought the machine without seeing it. The court allowed him to rescind the contract and recover his money.

The same rule is still applicable where the buyer has not seen the goods but he relies on the seller's description. In ***Ogwu v. Leventis Motors (1963) NRNLR 115*** the appellant contracted to buy a year old second hand lorry and he was given a four years old lorry. On discovering the error after the lorry has broken down on several occasions, the purchaser was allowed to return the lorry and claim his money.

In a sale by sample, the goods can be regarded as a description bulk of the goods. This illustrated in the case of ***Boshalli, v. Allied Commercial Exporters Ltd. (1961) 1 All NLR. 917***. The appellant in Nigeria contracted to buy cloth materials from the respondent IN England. Though, it was a contract of sale by description, the description was followed by a sample labeled and identified as the goods earlier described. When the sample taken from the bulk shipped was found inferior to the first sample, it was held that this constituted a breach of the condition as to description.

4.0 CONCLUSION

A representation which has induced the formation of a contract may itself be a term of that contract, that is, be an integral part of it, or it may form no part of it. If a representation has been made a term of the contract, it is called contractual representation; however, if it is not a term of the contract, it is technically know as 'mere representation'.

5.0 SUMMARY

In this unit we learnt what is representation, and how you can distinguish it from term. You should also bear in mind that the remedy available between a term of contract and a mere representation. And most importantly the factors that you will consider before you can say whether a statement is a term or mere representation.

6.0 TUTOR-MARKED ASSIGNMENT

1. What constitute representation?
2. What is the different between a term and representation?
3. John, a postman, buys a new computer from a department store. A prominently displayed notice in the store says that refunds will not be given on any goods bought. The shop assistant points the notice out to John before the contract is made. When John gets the computer home he cannot get it work. He asks a friend, Martha, to help him. Martha discovers that the computer is faulty. She also agrees to give John her old computer. Consequently, John no longer wants the bought computer. John takes the computer back to the store. However, the store refuses to refund the purchase

   price because the fault on the computer could easily be fixed and because the notice said that no refunds would be given. Advise John of his legal position.

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