

- **Formation:** what particular requirements exist for the creation of a valid contract
- **Negotiation phase:** parties exchange information & explore the possibility to reach an agreement to which they are prepared to bind themselves

### **What are the essential requirements of contract formation?**

- Three elements must be present for a contract to come into existence:
  1. The parties intend to be legally bound.
  2. **Either** formal execution of agreement in a deed, **or, as an alternative,** the exchange of "something of value" when the contract is made, called "consideration".
  3. Sufficient degree of agreement on terms of contract.

### **What is meant by an "objective" approach to ascertaining facts?**

- Must adopt **objective** approach to view cases or facts
  - "What conclusions would a reasonable person be able or likely to draw from the observable facts of the case?"

## **2. The Essential Elements of Contract Formation**

### **2.1 Intention to be legally bound**

#### **Inferring an intention to be legally bound**

- **First** essential element of contract formation: existence of an intention by the parties to create & take on legally binding obligations
- Having regard to the objectively knowable facts of the case & drawing appropriate inference
- Important as it allows to distinguish between enforceable agreement (contracts) & not enforceable in courts (non-contractual agreements)

#### **Agreements between family members**

- Not intended to be legally binding

#### **Agreement between friends**

- Made between friends, to provide volunteer or charitable services, not intended to be legally binding
- An onus lies on the person wishing to treat the agreement as legally binding to prove any additional circumstances from which an intention to be legally bound can be inferred.

## **A practical benefit as consideration**

- Past consideration has been given in exchange of a promise
- Promised has obtained some "practical benefit" / the promisor has undertaken some "practical detriment" by giving the promise
- Such practical benefit /detriment may be treated as sufficient consideration

## **2.3 The element of agreement**

Agreement = *consensus ad idem* = meeting of the minds

### **The extent of agreement needed**

- For a contract to be made, agreement must be reached on all things needed for a workable transaction (minimum requirements)
- Parties reach agreement on any matter that either party has indicated must be agreed upon before the contract is completed
- If parties have failed to reach agreement to this extent, the courts would not be able to enforce agreement = practical
- E.g. Selling goods, must agree on price, what item, what transaction I.e. Purchase & sale
- Judges will not themselves add terms to an incomplete agreement so as to make it enforceable

### **Illusory promises**

- Cannot be enforced
- When details are left to be fixed later at the discretion of the promisee alone

### **Conditional agreement**

- Conditional on an event that may / may not happen
- Contract is created only if & when the conditions is fulfilled

### **Reaching agreement by means of offer & acceptance**

- **Offer:** indication by one party that they are ready to contract on particular terms
- **Acceptance of offer:** in response, another party also indicated a readiness to contract on the offered terms
- **Reached agreement:** both an offer & acceptance

### **Advertisements & displays not generally "offers"**

- Does not matter if the person has read it before they signed it
- The law only asks whether a reasonable person observing the situation would conclude that, in the circumstances, the person signing the document appears to consent to the terms

### **Terms are final when the contract is created**

- Terms cannot be added to a contract after it has been made
- New undertakings would have to be incorporated in a new contract

### **Terms agreed to by reference**

- Terms can be incorporated into a contract simply by referring to them & making clear where they may be found, rather than setting them out in full
- Recent cases suggest that if terms referred to are unusual onerous, it may be necessary to point them out with greater precision than normal for them to become part of the contract

### **Notice of terms that are not immediately available**

- A party given reasonable notice of the existence of terms, even if they are not told exactly what the terms are
- E.g. Terms referred to on a ticket / in a notice are often incorporated into a contract

### **Agreement to terms contained in written documents**

- If the document is expected to contain contractual terms, party receiving the document will be held to have objectively agreed to terms, even if they do not read / sign it
- If document not expected to contain contractual terms, it is inferred that they didn't read it unless actually draw attention to the terms

### **Delivery notes as contractual documents**

- Document that contracting parties should expect may contain contractual terms
- Terms contained in a delivery note become terms of the contract without further notice
- Terms must be reasonable

### **Terms agreed by implication *ad hoc***

- Implications in the circumstances

- **Late performance**
- **Anticipatory breach** - before performance is due, one party indicated either expressly or by conduct that they will not perform the contract **or** in a different manner
  - Called *repudiation of the contract*
  - *Anticipatory breach or breach by anticipatory repudiation*

### Assessing the Seriousness of a Breach of Contract

- **The relative importance of terms**
- **Warranties and conditions**
- **Innominate terms** - unnamed / intermediate
  - Do not classify as conditions or warranties
  - Terms that are capable of being breached either in serious or in minor ways
  - Then breach determined by assessing the effect of the breach
  - Serious - condition
  - Less serious - warranty

### The Consequences of a Breach of Contract

- Generally: defaulting party outstanding contractual obligations undischarged
- **Remedy for non-defaulting party:**
  - Claim for damages to compensate for loss
  - Right to reject faulty performance and stop further performance
  - An order of specific performance
  - An injunction to stop a continuing breach

### Risks and Frustrations

- **Risks** - risk of accidental destruction of or harm to property falls on the owner of the property
  - Risk of other foreseeable loss or harm falls on the person who has taken on the risk of that loss or harm

### **Performance that will cause undue hardship**

- Will not order specific performance when will cause undue (unreasonable) hardship to the defaulting party
- Consideration of fairness above strict application of legal rules

### **3.2 Injunctions**

#### **Nature of an injunction**

- Injunction: court order that forbids or stops particular conduct that infringes another person's legal rights / puts another person's legal rights at risk
- Can be used in many circumstances, e.g. Threatened breach of contract
- It tries to preserve the situation as it is & prevent any further or likely breach of legal rights
- It normally only give temporary relief & additional litigation may be needed to resolve the case fully

#### **Injunctions to enforce negative promises**

- Courts can issue injunctions to *not* perform certain personal services
- Easy to enforce, easy to establish whether the court's order is contravened

#### **Injunctions and specific performance**

- If injunction would produce same result as specifically enforcing a promise to perform personal services, the courts will not issue the injunction
- Injunctions will not be used if it would be harsh or unfair

#### **Injunctions and anticipatory breach**

- Before court decide whether to issue injunction, they will consider whether damages would be adequate remedy should a breach occur

## **5. Agreed remedies**

### **5.1 Terms of contract that create or modify remedies**

- Parties will adopt a remedy that is otherwise not provided
- E.g. Agreeing to any disputes outside of court, agree in advance on the amount of damages that should be payable in the event of particular kinds of breach