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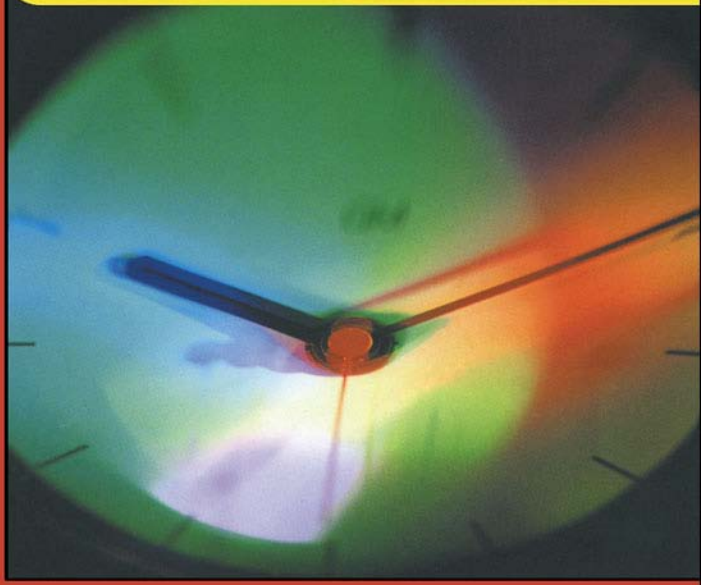

Business Law

Second Edition

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Business Law

Second Edition

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Contents

1 Sources of law

Legislation: law produced by Parliament

There are five stages, in each House of Parliament (Commons and Lords), through which a Bill must pass in order to become law:

(a) first reading;

(b) second reading;

(c) committee stage;

(d) report stage;

(e) third reading.

Then it is given royal assent.

The House of Lords has limited scope to delay legislation.

Delegated legislation: power delegated by Parliament to others to make law

Types of delegated legislation include:

(a) Orders in Council;

(b) statutory instruments;

(c) bylaws;

(d) professional regulations.

Advantages	Disadvantages
Speed of implementation.	Lack of accountability.
Saving of parliamentary time.	Lack of scrutiny.
Access to expertise; flexibility.	Lack of public knowledge.

Controls

Parliament	Courts
Joint Select Committee on Statutory Instruments.	*Ultra vires* provisions may be challenged through judicial review.

Ultra vires means that the party to whom power was delegated has exceeded their authority.

Case law

Law created by judges in the course of deciding cases.

Stare decisis

Binding precedent: courts are bound by the previous decisions of courts equal or above them in the court hierarchy (see below, p 4).

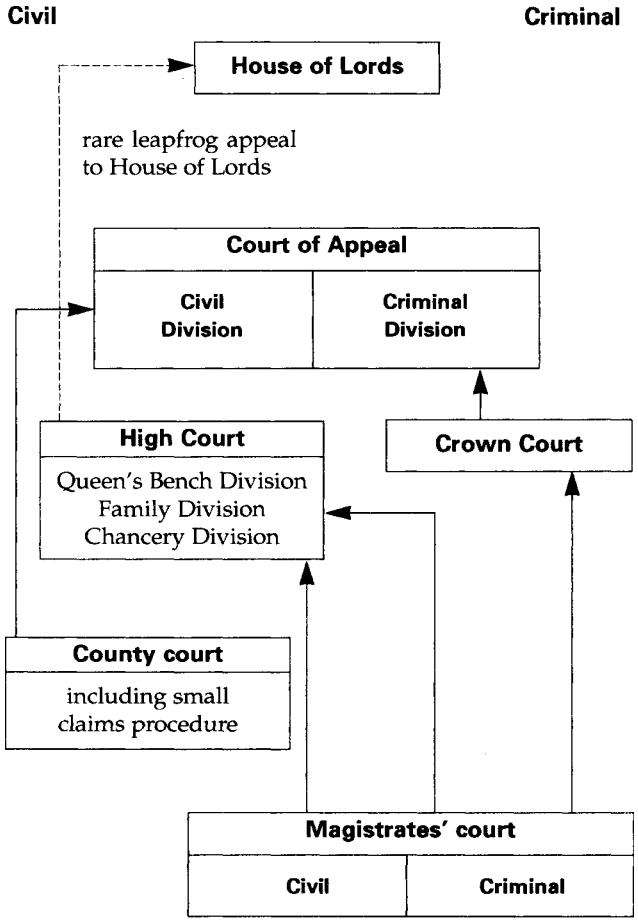
Ratio decidendi	*Obiter dictum*
the legal reason for decision binds.	Anything not in *ratio* does not have to be followed.
Overruling	**Distinguishing**
A court higher up in the hierarchy sets aside a legal ruling established in a previous case.	The case is said to be different from precedent, therefore it does not have to be followed.

The House of Lords can overrule its previous decisions (*Practice Statement* (1966)); lower courts, including the Court of Appeal, cannot, except in special circumstances (*Young v Bristol Aeroplane Co Ltd* (1944)).

Advantages	Disadvantages:
Time-saving.	Unconstitutionality.
Certainty.	Uncertainty.
Flexibility.	Fixity.

NB: notice the contradictory nature of the advantages and disadvantages.

The hierarchy of the courts



Statutory interpretation: how judges give practical meaning to legislation

The rules of interpretation

The literal rule: gives words in legislation their everyday meaning, even if this leads to an apparent injustice (*Fisher v Bell* (1961)).

The golden rule: used where the literal rule will result in an obvious absurdity (*Adler v George* (1964)).

The mischief rule: permits the court to go beyond the words of the statute in question to consider the mischief at which it was aimed (*Corkery v Carpenter* (1950)).

Aids to construction

Intrinsic assistance	Extrinsic assistance
Relies on the internal evidence of the statute: its title, preamble, or schedules.	Goes beyond the Act to dictionaries, textbooks, other statutes including the Interpretation Act, reports, other parliamentary papers.

Since *Pepper v Hart* (1993), *Hansard* may also be consulted.

Presumptions in interpreting statutes

Unless expressly rebutted, the following presumptions apply.

Against	In favour of
Alteration of the common law.	Requirement for *mens rea* in criminal offences.
Retrospective application.	Deriving the meaning of words from their contexts – the *noscitur a sociis* rule, the *eiusdem generis rule*, and the *expressio unius exclusio alterius* rule.
Deprivation of an individual's liberty, property or rights.	
Retrospective application.	
Application to the Crown	

2 European Union law

Sources

Treaties

Internal treaties	International treaties
Eg the Treaty of Rome, govern the Member States of the Union and anything contained therein supersedes domestic legal provisions.	Negotiated by the European Commission on behalf of the Union and are binding on the members of the Union.

Secondary legislation

Regulations	Directives	Decisions
Apply without the need for Member States to pass their own legislation.	State general goals and leave the Member States to implement them. The European Court of Justice can enforce Directives.	By the Commission on the operation of European laws have the force of law under Art 249 (formerly Art 189).

Judgments of the European Court of Justice

Overrule those of national courts or national legislation.

The institutions of the European Union

The Council of Ministers is made up of ministerial representatives of each of the 15 Member States of the

Union and is the supreme decision making body of the European Union. Qualified majority voting is the procedure in which the votes of the 15 Member States are weighted in proportion to their population, from 10 down to two votes each.

The European Parliament is directly elected. There are a total of 626 members (87 from the UK), divided amongst the 15 Member States approximately in proportion to the size of their various populations.

It is not a legislative institution and is subsidiary to the Council of Ministers.

The Commission is the executive of the European Union. There are 20 Commissioners chosen from the Member States. The Maastricht Treaty extended the term of office from four to five years; this is renewable. Commissioners have specific responsibility for particular areas of Union policy The Commission is responsible for ensuring that Treaty obligations and Regulations are met. It has been given wide powers to investigate and punish breaches of union law.

The Court of Justice is the judicial arm of the European Union in the field of Union law and its judgments overrule those of national courts. It decides whether any measures adopted by the Commission, Council or any national government are compatible with Treaty obligations. It also provides authoritative rulings, at the request of national courts, under Art 234 (formerly Art 177) of the EC Treaty, on the interpretation of points of Union law. See *Factortame Ltd v Secretary of State for Transport* (1989) and (1991).

3 Alternative dispute resolution

Arbitration

This is the procedure whereby parties in dispute refer the issue to a third party for resolution, rather than take the case to the ordinary law courts.

Arbitration procedures can be contained in the original contract or agreed after a dispute arises.

The procedure is governed by the Arbitration Act 1996, which reflects a shift from judicial control to the parties themselves deciding how they want their dispute resolved.

Arbitrators

Under the Act, arbitrators have a general duty to act fairly and impartially between the parties, giving each a reasonable opportunity to state its case; and to adopt procedures suitable for the circumstance of the case, thereby avoiding unnecessary delay or expense.

Arbitrators must decide the dispute:

- in accordance with the law chosen by the parties; or
- in accordance with such other considerations as the parties have agreed.

The court

The court has power, under s 24, to revoke the appointment of an arbitrator where the arbitrator has not acted impartially; does not possess the required qualifications; does not have either the physical or mental capacity to deal with the proceedings; or has failed to conduct the proceedings properly.

Once the decision of the panel has been made, there are limited grounds for appeal to the court in relation to:

(a) the substantive jurisdiction of the panel;

(b) procedural grounds;

(c) a point of law.

Where the parties agree to the arbitral panel making a decision without providing a reasoned justification for it, they will also lose the right to appeal.

Advantages over ordinary court system

The advantages of arbitration may be summarised as follows:

- privacy;
- informality;
- speed;
- lower cost;
- expertise;
- less antagonistic.

Small claims procedure in the county court is a distinct process, despite being referred to as arbitration.

Tribunals

There is, as an alternative to the court system, a large number of tribunals which have been set up under various Acts of Parliament to rule on the operation of the particular schemes established under those Acts.

Over a quarter of a million cases are dealt with by tribunals each year.

Types

Administrative tribunals	Domestic tribunals
Deal with cases involving conflicts between the State, its functionaries and private citizens.	Deal with private internal matters within institutions.

Tribunals may be administrative, but they are also adjudicative, in that they have to act judicially when deciding particular cases.

Tribunals are subject to the supervision of the Council on Tribunals, but are also under the control of the ordinary courts.

Tribunals usually comprise three members, only one of whom, the chair, is expected to be legally qualified.

Examples of tribunals

Examples of tribunals include:

- employment tribunals;
- Social Security Appeals Tribunal;
- Mental Health Review Tribunal;
- Lands Tribunal;
- Rent Assessment Committee.

Advantages	Disadvantages
Speed and cost. Informality and flexibility. Expertise. Accessibility. Privacy.	Appeals procedure. Lack of publicity. Lack of legal aid in most cases.

Mediation and conciliation

Mediation is the process whereby a third party acts as the conduit through which two disputing parties communicate and negotiate in an attempt to reach a common resolution of a problem.

Conciliation gives the mediator the power to suggest grounds for compromise and the possible basis for a conclusive agreement.

Both mediation and conciliation have been available in relation to industrial disputes under the auspices of the government funded Advisory Conciliation and Arbitration Service.

Advantage	Disadvantages
The parties to the dispute determine their own solutions and therefore feel committed to the outcome.	Mediation has no binding power and does not always lead to an outcome. Mediation does not necessarily challenge inherent power differentials in relationships.

4 Contract

The formation of contracts

The essential elements of a binding contractual agreement are as follows:

(a) offer;

(b) acceptance;

(c) consideration;

(d) capacity;

(e) intention to create legal relations;

(f) no vitiating factors.

The first five of these elements must be present, and the sixth absent.

Offer

An offer is a promise, which is capable of acceptance, to be bound on particular terms.

An offer must be distinguished from the following:

(a) a mere statement of intention (*Kleinwort Benson v Malaysian Mining Corp* (1989));

(b) a mere supply of information (*Harvey v Facey* (1893));

(c) an invitation to treat. This is an invitation to others to make offers. An invitation to treat cannot be accepted in such a way as to form a contract, nor can the person extending the invitation be bound to accept any offers made to them. Examples of invitations to treat are:

- the display of goods in a shop window (*Fisher v Bell* (1961));

- the display of goods on the shelf of a self-service shop (*Pharmaceutical Society of Great Britain v Boots Cash Chemists* (1953));
- a public advertisement (*Partridge v Crittenden* (1968));
- a share prospectus: contrary to common understanding, such a document is merely an invitation to treat, inviting people to make offers to subscribe for shares in a company;
- auctions operate on the basis of the auctioneer inviting, and accepting offers from the bidders.

Offers to particular people

An offer may be made to a particular person, to a group of people, or to the world at large. In the latter case, it can be accepted by anyone (*Carlill v Carbolic Smoke Ball Co* (1893)).

Termination of offers

If an offer is accepted (see below), then a contract is formed, but the offer can be brought to an end without involving the creation of a contract, as follows:

(a) *rejection:* if a person to whom an offer has been made rejects it, then they cannot subsequently accept the original offer;

(b) *a counter-offer:* where the offeree tries to change the terms of the original offer, has the same effect (*Hyde v Wrench* (1840));

(c) a counter-offer should not be confused with a *request for information,* which does not end the offer (*Stevenson v Mclean* (1880));

(d) *revocation of offer:* where the offeror withdraws the offer, means that the offer cannot be accepted (*Routledge v*

Grant (1828)). Revocation must be received by the offeree, but communication may be made through a reliable third party (*Dickinson v Dodds* (1876));

(e) where *an option contract* has been created, the offeror cannot withdraw the offer before the agreed time. In the case of unilateral contracts, revocation is not permissible once the offeree has started performing the task requested (*Errington v Errington* (1952));

(f) *lapse of offers:* occurs where the parties agree, or the offeror sets, a time limit within which acceptance has to take place. If the offer is not accepted within that period, then it lapses and can no longer be accepted. Where no time limit has been set, it will still lapse after a reasonable time, depending on the circumstances of the case.

Acceptance

Acceptance of an offer creates a contract, but acceptance must correspond with the terms of the offer. Also, the following should be remembered:

(a) *knowledge and motive:* no one can accept an offer that they do not know about, but the motive for accepting is not important (*Williams v Carwadine* (1883));

(b) *form of acceptance:* acceptance may be in the form of express words, either spoken or written; but, equally, it may be implied from conduct (*Brogden v Metropolitan Railway Co* (1877));

(c) *communication of acceptance:* acceptance must be communicated to the offeror: silence cannot amount to acceptance (*Felthouse v Bindley* (1863));

except:

- in unilateral contracts *(Carlill v Carbolic Smoke Ball Co);*
- where the postal rule operates (*Adams v Lindsell* (1818)). The postal rule applies to telegrams: it does not apply to instantaneous communication (*Entores v Far East Corpn* (1955)).

The postal rule only applies where the parties expect the post to be used as the means of acceptance. It can be excluded by requiring that acceptance is only to be effective on receipt (see *Holwell Securities v Hughes* (1974)).

Consideration

In *Dunlop v Selfridge* (1915), the House of Lords adopted the following definition of consideration:

> 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.

Types of consideration

Executory consideration

This is the promise to perform an action at some future time. A contract can thus be made on the basis of an exchange of promises as to future action.

Executed consideration

In the case of unilateral contracts, where the offeror promises something in return for the offeree's doing something, the promise only becomes enforceable when the offeree has actually performed the required act.

Past consideration

This category does not actually count as consideration. With past consideration, the action is performed before the promise that it is supposed to be the consideration for. Such action is not sufficient to support a later promise (*Re McArdle* (1951)).

There are exceptions to the rule that past consideration will not support a valid contract:

(a) under s 27 of the Bills of Exchange Act 1882;

(b) under s 29 of the Limitation Act 1980, a time barred debt becomes enforceable again if it is acknowledged in writing;

(c) where the claimant performed the action at the request of the defendant and payment was expected (*Re Casey's Patents* (1892)).

Rules relating to consideration

To be effective, consideration must comply with certain rules:

(a) consideration must not be past (see above);

(b) performance must be legal;

(c) performance must be possible;

(d) consideration must move from the promisee (*Tweddle v Atkinson* (1861));

(e) consideration must be sufficient, but need not be I adequate: the court will not intervene to require equality in the value exchanged, as long as the agreement has been freely entered into (*Thomas v Thomas* (1842); and *Chappell and Co v Nestle Co* (1959)).

Performance of existing duties

There are rules regarding performance of existing duties:

(a) performance of a public duty cannot be consideration for a promised reward (*Collins v Godefroy* (1831)). Where a promisee does more than his/her duty, they are entitled to claim on the promise (*Glassbrook v Glamorgan CC* (1925));

(b) performance of a contractual duty: the rule used to be that the performance of an existing contractual duty owed to the promisor could not be consideration for a new promise (see *Stilk v Myrick* (1809)). Some additional consideration had to be provided (see *Hartley v Ponsonby* (1857)). *Williams v Roffey Bros* (1990) now appears to allow performance of an existing contractual duty to provide consideration for a new promise in circumstances where there is no question of fraud or duress, and where the promisor receives practical benefits;

(c) performance of a contractual duty owed to one person can amount to valid consideration for the promise made by another person (see *Shadwell v Shadwell* (1860)).

Consideration in relation to the waiver of existing rights

In *Pinnel's Case* (1602), it was stated that a payment of a lesser sum cannot be any satisfaction for the whole. This opinion was approved in *Foakes v Beer* (1884).

However, the following will operate to discharge an outstanding debt fully:

(a) payment in kind;

(b) payment at a different place;

(c) payment of a lesser sum by a third party;

(d) a composition arrangement between creditors that they will accept part payment of their debts;

(e) estoppel: treated separately below.

Promissory estoppel

This equitable doctrine prevents promisors from going back on their promises. The doctrine first appeared in *Hughes v Metropolitan Railway Co* (1877) and was revived in *Central London Property Trust Ltd v High Trees House Ltd* (1947).

The precise scope of the doctrine of promissory estoppel is far from certain. However, the following points may be made:

(a) it arises from a promise made by a party to an existing contractual agreement (*WJ Alan and Co v El Nasr Export and Import Co* (1972));

(b) it only varies or discharges of rights within a contract, and does not apply to the formation of contracts;

(c) it normally only suspends rights (*Tool Metal Manufacturing Co v Tungsten Electric Co* (1955));

(d) rights may be extinguished, however, in the case of a non-continuing obligation, or where the parties 5 cannot resume their original positions;

(e) the promise relied upon must be given voluntarily (*D and C Builders v Rees* (1966)).

Capacity

Capacity refers to a person's ability to enter into a contract. In general, all adults of sound mind have full capacity. The capacity of certain individuals, however, is limited by the Minors' Contracts Act 1987.

Minors

A minor is a person under the age of 18 (the age of majority was reduced from 21 to 18 by the Family Reform Act 1969). The law tries to protect such persons by restricting their contractual capacity and thus preventing them from entering into disadvantageous agreements.

Agreements entered into by minors may be classified within three possible categories (see below).

Valid contracts	Voidable contracts	Unenforceable contracts
Enforceable against minors. Contracts for necessaries: necessaries are goods suitable to the condition in life of the minor and their actual requirements at the time of sale (s 3 of the Sale of Goods Act 1979; *Nash v Inman* (1908)).	Enforceable against minors, unless repudiated during minority, or a reasonable time thereafter. Transactions involving continuing obligations, eg, contracts for shares, or leases of property, or partnership agreements.	Unenforceable against minors; absolutely void under the Infants Relief Act 1874. Contracts for the repayment of loans; contracts for goods other than necessaries; accounts stated, ie, admissions of money owed.
Beneficial contracts of service: a minor is bound by a contract of apprenticeship or employment, as long as it is, on the whole, for their benefit (*Doyle v White City Stadium* (1935)). There has to be an element of education or training in the contract and ordinary trading contracts will not be enforced (*Mercantile Union Guarantee Corpn v Ball* (1937)).	Payments made prior to repudiation: cannot be recovered unless there is a total failure of consideration (*Steinberg v Scala (Leeds)* (1923)).	The Minors' Contracts Act 1987 now allows ratification on attaining the age of majority, and has given the courts wider powers to order the restoration of property acquired by a minor.

Minors' liability in tort

As there is no minimum age limit in relation to actions in tort, minors may be liable under a tortious action. The courts will not permit a party to enforce a contract indirectly by substituting an action in tort, or quasi-contract, for an action in contract (*Leslie v Shiell* (1914)).

Mental incapacity and intoxication

A contract by a person who is of unsound mind or under the influence of drink or drugs is *prima facie* valid.

To avoid a contract such a person must show:

(a) that their mind was so affected at the time that they were incapable of understanding the nature of their actions; and

(b) that the other party either knew or ought to have known of their disability.

In any case, they must pay a reasonable price for necessaries sold and delivered to them.

Privity

This refers to the rule that a contract can only impose rights or obligations on persons who are parties to it, so third parties cannot sue on the basis of a contract between two other parties (*Dunlop v Selfridge* (1915)).

There are, however, a number of consequences of the privity rule:

(a) the beneficiary sues in some other capacity: a third party can enforce a contract where they are legally appointed to administer the affairs of one of the original parties (*Beswick v Beswick* (1967));

(b) the situation involves a collateral contract: a collateral contract arises where one party promises something to another party if that other party enters into a contract with a third party: eg, A promises to give B something if B enters into a contract with C. In such a situation the second party can enforce the original promise, ie, B can insist on A complying with the original promise (*Shanklin Pier v Detel Products Ltd* (1951));

(c) there is a valid assignment of the benefit of the contract: a party to a contract can transfer the benefit of that contract to a third party through the formal process of assignment. The assignment must be in writing, and the assignee receives no better rights under the contract than the assignor possessed. The burden of a contract cannot be assigned without the consent of the other party to the contract;

(d) it is foreseeable that damage caused will be passed on to a third party (*Linden Gardens Trust Ltd v Lenesta Sludge Disposals Ltd* (1994));

(e) one of the parties has entered the contract as a trustee for a third party (*Les Affréteurs Réunis SA v Leopold Walford (London) Ltd* (1919)).

Intention to create legal relations

This principle operates to reduce the number of cases that courts have to deal with. The courts only have to deal with cases that the parties intended to make binding in the first place.

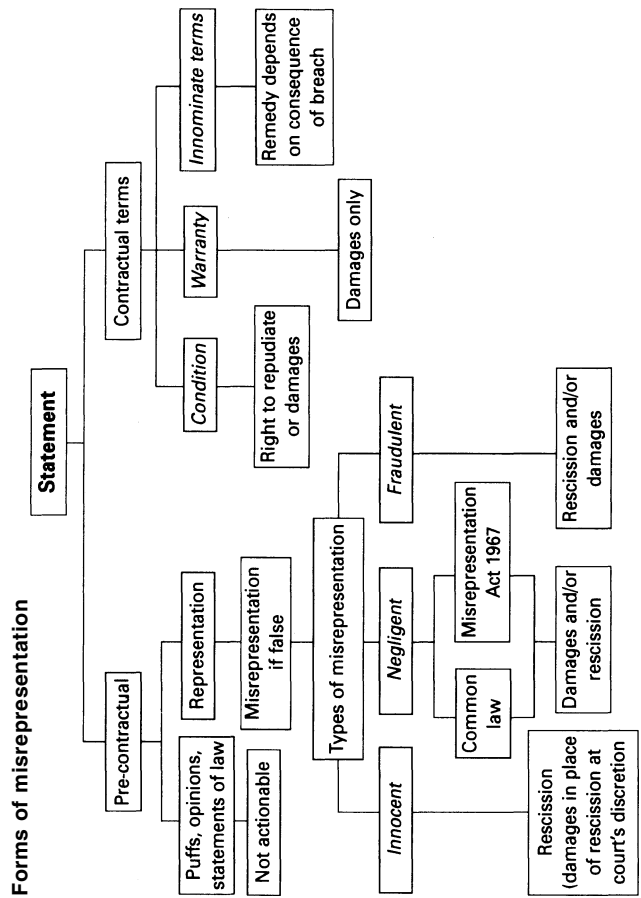
The test is an *objective* one, and the courts apply different *rebuttable presumptions* depending on the particular context of the case.

Domestic and social agreements	Commercial agreements
The presumption is that the parties do not intend to create legal relations (*Balfour v Balfour* (1919); *Simpkins v Pays* (1955); *Jones v Pandavatton* (1969)).	The presumption is that the parties intend to create legal relations (*Edwards v Skyways* (1964)).
Evidence can be brought to rebut the presumption (*Merritt v Merritt* (1970)).	It will usually take express wording to the contrary to avoid its operation (*Rose and Frank Co v Crompton Bros* (1925)).
	Agreements which are 'binding in honour' do not create legal relations (*Jones v Vernon's Pools Ltd* (1938)).

Collective agreements

Agreements between employers and trade unions are commercial agreements, but are presumed not to give rise to legal relations (*Ford Motor Co v AUEFW* (1969)).

5 Contents of contracts



Not all statements made in negotiating contracts have the same legal effect. It is necessary to distinguish between contractual terms and mere representations.

Contractual terms	**Mere representations**
Part of contract.	Not part of contract.
Remedy if false – breach of contract.	Remedy if false – misrepresentation.
Tests	**Tests**
Where the statement is of such importance that the promisee would not have entered into the agreement without it (*Bannerman v White* (1861)).	Where there is a time gap between the statement and the making of the contract (*Routledge v McKay* (1954)).
Where the statement is made by party with special knowledge or skill (*Dick Bentley Productions Ltd v Harold Smith (Motors) Ltd* (1965)).	Where the statement is oral, and the agreement is subsequently drawn up in written form (*Routledge v McKay* (1954)).
	Where statement made to party with special knowledge or skill (*Oscar Chess Ltd v Williams* (1957)).

Conditions, warranties, and innominate terms

One also has to distinguish between types of terms:

Conditions	Warranties	Innominate terms
A fundamental part of the agreement.	A subsidiary obligation in the agreement.	The remedy depends on the consequence of the breach.
Breach gives the right either to terminate the contract or to go through with the agreement and sue for damages (*Poussard v Spiers and Pond* (1876)).	Breach does not give the right to terminate the contract; only damages available (*Bettini v Gye* (1876)).	If 'substantially the whole benefit of the contract' is lost, then repudiation is possible; if not, then only damages available (*Cehave v Bremer (The Hansa Nord)* (1976)).

Implied terms do not have to be stated, but are automatically introduced into the contract by implication. Implied terms can be divided into three types:

Terms implied by statute	Terms implied by custom	Terms implied by the courts
For example, the Sale of Goods Act 1979 implies terms relating to description, satisfactory quality, and fitness for purpose into sale of goods contracts.	An agreement may be subject to customary terms, not actually specified by the parties (*Hutton v Warren* (1836)). Custom cannot override the express terms of an agreement (*Les Affréteurs v Walford* (1919)).	On occasion, the court will presume that the parties intended to include a term which is not expressly stated. Done to give business efficacy to the contract (*The Moorcock* (1889)). Decided on the basis of 'the officious bystander' test.

Parol evidence rule

If all the terms of a contract are in writing, then there is a strong presumption that no evidence supporting a different oral agreement will be permitted to vary those terms (*Button v Watling* (1948)).

The presumption may be rebutted where the document was not intended to set out all the terms agreed on by the parties (*Re SS Ardennes* (1951)).

Exemption and exclusion clauses

An exemption clause is a term in a contract which tries to exempt, or limit, the liability of a party in breach of the agreement. They are controlled by a mixture of common

law, the Unfair Contract Terms Act 1977 (UCTA), the Unfair Terms in Consumer Contracts Regulations 1994, and the various Acts which imply certain terms into particular contracts.

The following questions should always be asked with regard to exclusion clauses:

(a) Has the exclusion clause been incorporated into the contract?

(b) Does the exclusion clause effectively cover the breach?

(c) What effect do UCTA and the Unfair Terms in Consumer Contracts Regulations have on the exclusion clause?

Has the exclusion clause been incorporated into the contract?

An exclusion clause cannot be effective unless it is actually a term of a contract. There are three ways in which such a term may be inserted into a contractual agreement, as shown in the following diagram.

Signature	Notice	Custom
If a person signs a contractual document, then they are bound by its terms, even if they did not read it (*L'Estrange v Graucob* (1934)).	In order for notice to be adequate, the document bearing the exclusion clause must be an integral part of the contract, and given at the time the contract is made (*Chapleton v Barry UDC* (1940) and *Olley v Marlborough Court Ltd* (1949)).	Previous dealings on the basis of an exclusion clause may include the clause in later contracts (*Spurling v Bradshaw* (1956)).
This rule may be avoided where the party seeking to rely on the exclusion clause misled the other party into signing the contract (*Curtis v Chemical Cleaning and Dyeing Co* (1951)).	The greater the exemption, the greater the degree of notice required (*Thornton v Shoe Lane Parking Ltd* (1971)).	However, actual knowledge of the exclusion clause is required (*Hollier v Rambler Motors* (1972)).

Does the exclusion clause effectively cover the breach?
The *contra proferentem* rule requires any uncertainty or ambiguity in the exclusion clause to be interpreted against the meaning claimed for it by the person seeking to rely on it (*Andrews v Singer* (1934)).

What effect does the Unfair Contract Terms Act 1977 have on the exclusion clause?

Negligence	Contract
There is an absolute prohibition on exemption clauses in relation to liability in negligence resulting in death or injury (ss 2 and 5).	These provisions apply in all consumer transactions, and non-consumer transactions where one party deals on the other's standard terms.
Exemption clauses relating to liability for other damage caused by negligence will only be enforced to the extent that they satisfy the 'requirement of reasonableness' (s 2 and *Smith v Bush* (1989)).	Any exclusion clause which seeks to avoid liability for breach of contract is only valid to the extent that it complies with the 'requirement of reasonableness' (s 3).
	This test also applies where a clause seeks to permit a party to avoid performing the contract completely, or to permit performance less than reasonably expected.

The requirement of reasonableness means 'fair and reasonable...having regard to the circumstances...' (s 11).

Schedule 2 provides guidelines for the reasonableness test in regard to non-consumer transactions, but it is likely that similar considerations will be taken into account by the courts in consumer transactions. Amongst these considerations are:

(a) the relative strength of the parties' bargaining power;

(b) whether any inducement was offered in return for the limitation on liability;

(c) whether the customer knew, or ought to have known, about the existence or extent of the exclusion;

(d) whether the goods were manufactured or adapted to the special order of the customer.

The application of the Act may be seen in *George Mitchell (Chesterhall) Ltd v Finney Lock Seeds Ltd* (1983).

The Unfair Terms in Consumer Contracts Regulations 1994, introduced to implement the European Unfair Contract Terms Directive, run in parallel with the UCTA.

They apply to 'any term in a contract concluded between a seller or supplier and a consumer where the term has not been individually negotiated' and are, therefore, wider in scope than UCTA. They focus on the formal procedure through which contracts are made, rather than the substantive contents of the contract in question. They strike out terms which are unfair as being not entered into in good faith. They also introduce a requirement that contracts should be made in plain intelligible language and give the Director General of Fair Trading the power to take out injunctions against unfair terms.

6 Vitiating factors in contract

Mistake

Very few mistakes will affect the validity of a contract at common law, but where a mistake is operative, it will render the contract void. This has the effect that property transferred under operative mistake can be recovered, even where it has been transferred to an innocent third party.

It is usual to divide mistakes into the following three categories:

Common mistake	**Mutual mistake**	**Unilateral mistake**
Both parties to an agreement share the same mistake. It must be of a fundamental nature.	The parties have different views of the situation, but they do not realise it.	Only one of the parties to the agreement is mistaken and the other party is aware of it.
Bell v Lever Bros Ltd (1932) suggests that a mistake as to quality can never render an agreement void for mistake. *Res extincta* – the mistake is as to the existence of the subject matter of the contract (*Couturier v Hastie* (1856)).	The court will try to decide which of the competing views of the situation a reasonable person would support, and the contract will be enforceable on such terms (*Smith v Hughes* (1871)).	Cases involving unilateral mistake mainly relate to identity. A contract will only be void for mistake where the seller intended to contract with a different person from the one with whom they actually did contract.

Common mistake	Mutual mistake	Unilateral mistake
Res sua – the mistake is that one of the parties to the contract already owns what he is contracting to receive (*Cooper v Phibbs* (1867)). Equity may intervene in regard to common mistake, namely, setting an agreement aside completely or on particular terms (*Magee v Pennine Insurance Co Ltd* (1969)).	If the court is unable to decide the outcome on the basis of an objective 'reasonable person' test, then the contract will be void (*Raffles v Wichelhaus* (1864) and *Scriven Bros v Hindley and Co* (1913)).	It is important to distinguish between misrepresentation and unilateral mistake – mistake makes a contract void, misrepresentation merely makes it voidable, and good title can be passed before the contract is avoided. This distinction will be seen in comparing *Ingram v Little* with *Phillips v Brooks*, and *Cundy v Lindsay* (1878) with *King's Norton Metal Co v Edridge, Merrit and Co* (1897).

Mistake in respect of documents

There are two mechanisms for dealing with mistakes in written contracts.

Rectification	*Non est factum*
An equitable doctrine which allows documents to be altered where they do not state the actual intentions of the parties (*Joscelyne v Nissen* (1970)).	Where someone signs a document under a misapprehension as to its true nature, the law may permit them to claim *non est factum*, ie, that the document is not their deed. The person signing the document must not have been careless (*Saunders v Anglia Building Society* (1970)).

Misrepresentation

Misrepresentation is a false statement of fact, made by one party before, or at the time of, the contract, which induces the other party to enter into the contract.

There must be a statement.

Silence does not generally amount to a representation, except:

(a) where the statement is a half truth; it may be true, but misleading none the less (*Notts Patent Brick and Tile Co v Butler* (1886));

(b) where the statement was true when made, but has subsequently become false before the contract is concluded (*With v O'Flanagan* (1936));

(c) where the contract is *uberrimae fidei*, ie, made in utmost good faith; in such contracts there is a duty to disclose all material facts.

The following statements will not amount to a representation:

(a) mere sales puffs (*Dimmock v Hallett* (1866));

(b) statements of law;

(c) statements of opinion (*Bisset v Wilkinson* (1927)). If the person does not actually believe the truth of the opinion they express, then an action for misrepresentation will be possible (*Edgington v Fitzmaurice* (1884)).

The statement must actually induce the contract:

(a) the statement must have been made by one party to the contract to the other, and not by a third party;

(b) the statement must have been addressed to the person claiming to have been misled;

(c) the person claiming to have been misled must have been aware of the statement;

(d) the person claiming to have been misled must have relied on the statement (*Horsfall v Thomas* (1962)).

Types of misrepresentations

Misrepresentation can be divided into three types.

Fraudulent misrepresentations	Negligent misrepresentation	Innocent misrepresentation
Statement made, knowing it to be false, or believing it to be false, or recklessly careless whether it is true or false (*Derry v Peek* (1889)).	Statement made in the belief that it is true, but without reasonable grounds for that belief.	Statement made by a person who not only believes it to be true, but also has reasonable grounds for that belief.

Negligent misrepresentation can be divided further into two types.

At common law	Misrepresentation Act 1967 (MA)
The possibility of liability in negligence for misstatements arose from *Hedley Byrne and Co v Heller* (1964).	Reverses the common law burden of proof.
In *Esso Petroleum v Mardon* (1976), Mardon succeeded in an action for negligent misstatement.	Where a misrepresentation has been made, then under s 2(1) of the Act it is up to the party who made the statement to show that they had reasonable grounds for believing it to be true.

Remedies for misrepresentation

Fraudulent misrepresentation	Negligent misrepresentation	Innocent misrepresentation
Rescission, and/or damages.	Rescission, and/or damages. Under the MA, the measure of damages still determined as in tort actions (*Royscot Trust Ltd v Rogerson* (1991)).	Common law remedy is rescission. Under s 2(2) of the MA damages may be awarded instead of rescission.

With regard to s 2(2) of the MA, the court can usually only award damages where the remedy of rescission is still available (but see *Thomas Witter v TBP Industries* (1996)), and the right to rescind can be lost:

(a) by affirmation, either express or implied (*Leaf v International Galleries* (1950));

(b) where the parties cannot be restored to their original positions;

(c) where third parties have acquired rights in the subject matter of the contract (*Phillips v Brooks* (1919)).

Duress

If force, either physical or economic, is used to form a contract, then the contract is voidable at the instance of the innocent party (*Barton v Armstrong* (1975) and *North Ocean Shipping Co v Hyundai Construction* (1979)).

Claimants must show two things:

(a) that pressure, which resulted in an absence of choice on their part, was brought to bear on them; and

(b) that the pressure was of a nature considered illegitimate by the courts.

Undue influence

Transactions, either contract or gifts, may be avoided where they have been entered into as a consequence of the undue influence of the person benefiting from them. The effect of undue influence is to make a contract voidable, but delay may bar the right to avoid the agreement.

There are two possible situations relating to undue influence, shown in the following diagram.

Special relationships

There is a presumption that the transaction is the consequence of undue influence.

The burden of proof is on the person receiving the benefit to rebut the presumption (*Re Craig* (1971)).

Examples of special relationships are:

(a) parent and child while still a minor;

(b) guardian and ward;

(c) religious adviser and follower;

(d) doctor and patient;

(e) solicitor and client.

The list is not a closed one and other relationships may be included within the scope of the special relationship.

Even where a special relationship exists, a transaction will not be set aside unless it is shown to be manifestly disadvantageous (*National Westminster Bank v Morgan* (1985)).

No special relationship

The burden of proof is on the party claiming the protection of the undue influence doctrine.

The rule relating to manifest disadvantage, applying in relation to special relationships, does not apply where no special relationship exists (*CIBC Mortgages plc v Pitt* (1993)).

The key element in deciding whether a relationship was a special one or not was whether one party was in a position of dominance over the other (*National Westminster Bank v Morgan* (1985)).

Contracts in restraint of trade

A contract in restraint of trade is an agreement whereby one party restricts its future freedom to engage in their trade, business, or profession. The general rule is that such agreements are *prima facie* void, but they may be valid if it can be shown that they meet the following requirements:

(a) the person imposing the restrictions has a legitimate interest to protect;

(b) the restriction is reasonable as between the parties; the restriction is not contrary to the public interest.

The doctrine of restraint of trade is flexible in its application, and may be applied to new situations when they arise. Bearing this in mind, however, it is usual to classify the branches of the doctrine as follows.

Restraints on employees	**Restraints on vendors of business**	**Restraints on distributors' solus agreements**
Employers cannot protect themselves against competition from an ex-employee, except where they have a legitimate interest to protect. The only legitimate interests recognised by the law are trade secrets and trade connection.	Restrictions may legitimately be placed on previous owners to prevent them from competing, in the future, with new owners. The restraint should not be greater than is necessary to protect that interest (*British Concrete v Schelff* (1921)).	This category of restraint of trade is usually concerned with solus agreements between petrol companies and garage proprietors.

Restraints on employees	Restraints on vendors of business	Restraints on distributors' solus agreements
Even in protecting those interests, the restraint must be of a reasonable nature. What constitutes 'reasonable' in this context depends on the circumstances of the case (*Lamson Pneumatic Tube Co v Phillips* (1904) and *Empire Meat Co Ltd v Patrick* (1939)). The longer the period of time covered by the restraint, the more likely it is to be struck down, but in *Fitch v Dewes* (1921), it was held that a lifelong restriction placed on a solicitor was valid.	In *Nordenfeld v Maxim Nordenfeld Guns and Ammunition Co* (1894), a worldwide restraint on competition was held to be enforceable.	Petrol companies have a legitimate interest to protect, and the outcome depends on whether the restraint obtained in protection of that interest is reasonable (*Esso Petroleum v Harper's* (1968)). *Esso v Harper's* does not create a rule that any solus agreement involving a restriction which was to last longer than five years must be void as being in restraint of trade. Each case depends on its particular circumstances (*Alec Lobb (Garages) Ltd v Total Oil Ltd* (1985)).

Exclusive service contracts are structured to exploit one of the parties, by controlling and limiting their output, rather than assisting them. The most famous cases involve musicians (eg, *Schroeder Music Publishing Co v Macauley* (1974)).

7 Discharge of contracts

Discharge of contract means that the parties to an agreement are freed from their contractual obligations.

A contract is discharged in one of four ways:

(a) agreement;

(b) performance;

(c) frustration;

(d) breach.

Discharge by agreement

The contract itself may contain provision for its discharge, by either the passage of a fixed period of time, or the happening of a particular event.

Alternatively, it may provide, either expressly or by implication, that one or other of the parties can bring it to an end, as in a contract of employment.

Where there is no such provision in a contract, another contract is required to cancel it before all the obligations have been met. There are two possible situations.

Where the contract is executory	Where the contract is executed
The mutual exchange of promises to release one another from future performance will be sufficient consideration.	The other party must provide consideration to be released from their part of the contract; this is accord and satisfaction.

Discharge by performance

This is the normal way in which contracts are discharged. As a general rule, discharge requires complete and exact performance of the obligations in the contract (*Cutter v Powell* (1795)).

There are four exceptions to the general rule requiring complete performance:

(a) where the contract is divisible (*Bolton v Mahadeva* (1972));

(b) where the contract is capable of being fulfilled by substantial performance (*Hoenig v Isaacs* (1952));

(c) where performance has been prevented by the other party;

(d) where partial performance has been accepted by the other party.

Discharge by frustration

The doctrine of frustration permits a party to a contract, in the following circumstances, to be excused performance on the grounds of impossibility, arising after the formation of the contract:

(a) destruction of the subject matter of the contract has occurred (*Taylor v Caldwell* (1863));

(b) government interference, or supervening illegality, prevents performance (*Re Shipton and Co* (1915));

(c) a particular event, which is the sole reason for the contract, fails to take place (*Krell v Henry* (1903)); this only applies where the cancelled event was the sole purpose of the contract (*Herne Bay Steamboat Co v Hutton* (1903));

(d) the commercial purpose of the contract is defeated (*Jackson v Union Marine Insurance Co* (1874));

(e) in the case of a contract of personal service, the party dies or becomes otherwise incapacitated (*Condor v Barron Knights* (1966)).

Frustration will not apply where:

(a) the parties have made express provision in the contract for the event which has occurred;

(b) the frustrating event is self-induced (*Maritime National Fish Ltd v Ocean Trawlers Ltd* (1935));

(c) an alternative method of performance is still possible (*Tsakiroglou and Co v Noblee and Thorl* (1962));

(d) the contract simply becomes more expensive to perform (*Davis Contractors v Fareham UDC* (1956)).

The effect of frustration

At common law, the effect of frustration was to make the contract void as from the time of the frustrating event.

Under the Law Reform (Frustrated Contracts) Act 1943:

(a) money paid is recoverable;

(b) money due to be paid ceases to be payable;

(c) the parties may be permitted to retain expenses incurred from any money received, or recover those expenses from money due to be paid before the frustrating event;

(d) where a party has gained a valuable benefit under the contract he may be required to pay a reasonable sum in respect of it.

Discharge by breach

Breach of a contract occurs where one of the parties to the agreement fails to comply, either completely or satisfactorily, with their obligations under it.

A breach of contract may occur in three ways:

(a) where a party, prior to the time of performance, states that they will not fulfil their contractual obligation;

(b) where a party fails to perform their contractual obligation;

(c) where a party performs their obligation in a defective manner.

Anticipatory breach

This is where one party, prior to the actual due date of performance, demonstrates an intention not to perform their obligations. The intention not to fulfil the contract can be either express (*Hochster v De La Tour* (1853)), or implied (*Omnium D'Enterprises v Sutherland* (1919)).

The innocent party can sue for damages immediately, as in *Hochster v De La Tour,* or can wait until the time for performance before taking action. In the latter instance, they are entitled to make preparations for performance, and claim the agreed contract price (*White and Carter (Councils) v McGregor* (1961)).

Remedies for breach of contract

The principal remedies for breach of contract are:

(a) damages;

(b) *quantum meruit;*

(c) specific performance;
(d) injunction.

Damages

The estimation of what damages are to be paid by a party in breach of contract can be divided into two parts: remoteness and measure of damages.

Remoteness of damage	Measure of damages
The rule in *Hadley v Baxendale* (1845) states that damages will only be awarded in respect of losses which either arise naturally, *or* which both parties may reasonably be supposed to have contemplated, when the contract was made, as a probable result of its breach.	The aim is to put the injured party in the same position he would have been in had the contract been properly performed. The market rule: the buyer is entitled to buy similar goods, and pay the market price prevailing at the time. They can then claim the difference in price between what they paid and the original contract price as damages, and conversely if a buyer refuses to accept goods.
The party in breach can only be held liable for abnormal consequences where they have actual knowledge that the abnormal consequences might follow (*Victoria Laundry Ltd v Newham Industries Ltd* (1949) and *The Heron II* (*Czarnikow v Koufos*) (1967)).	The duty to mitigate losses: the buyer of goods which are not delivered has to buy the replacements as cheaply as possible; and the seller of goods has to try to get as good a price as he can when he sells them (*Payzu v Saunders* (1919)).

Non-pecuniary loss can be recovered (*Jarvis v Swan Tours Ltd* (1973)).

Liquidated damages and penalties

Liquidated damages	Penalties
Are a genuine pre-estimate of loss for breach of contract.	Are to punish the person in breach rather than to compensate the other party.
The court will recognise and apply such estimates.	If the court considers the provision to be a penalty, it will not give it effect, but will award damages in the normal way (*Dunlop v New Garage and Motor Co* (1915)).

Quantum meruit

This means that a party should be awarded 'as much as they have earned'.

If the parties enter into a contractual agreement without determining the reward that is to be provided for performance, then in the event of any dispute, the court will award a reasonable sum.

Payment may also be claimed on the basis of *quantum meruit* where a party has carried out work in respect of a void contract (*Craven-Ellis v Canons Ltd* (1936)).

Specific performance

It will sometimes suit a party to break their contractual obligations, and pay damages; but, through an order for

specific performance, the party in breach may be instructed to complete their part of the contract:

(a) an order of specific performance will only be granted in cases where the common law remedy of damages is inadequate;

(b) specific performance will not be granted where the court cannot supervise its enforcement (*Ryan v Mutual Tontine Westminster Chambers Association* (1893)).

Injunction

This is also an equitable order of the court, which directs a person not to break their contract. It can have the effect of indirectly enforcing contracts for personal service (*Warner Bros v Nelson* (1937)).

An injunction will only be granted to enforce negative covenants within the agreement, and cannot be used to enforce positive obligations (*Whitwood Chemical Co v Hardman* (1891)).

8 Agency

Definition

An agent is a person who is empowered to represent another legal party, called the principal, and brings the principal into a legal relationship with a third party.

Agency agreements may be either contractual or gratuitous.

Types of agency

There are four types of agent:

(a) a general agent has the power to act for a principal generally in relation to a particular area of business;

(b) a special agent only has the authority to act in one particular transaction;

(c) a *del credere* agent, for an additional commission, guarantees payment to the principal;

(d) a commission agent owes the duties of an agent to his principal but contracts with the third party as a principal in his own right.

Creation of agency

Agency requires the consent of the principal (*White v Lucas* (1887)), but consent may be implied.

Agency may be created expressly or may arise in the following ways:

Ratification	Implication	Necessity
Where a person who has no authority purports to contract with a third party on behalf of a principal, the principal may elect to adopt the contract and give retrospective validity to the action of the purported agent.	Arises from the relationship that exists between the principal and the agent. It is assumed that the principal has given authority to the other person to act as his agent.	Occurs under circumstances where, although there is no agreement between the parties, an emergency requires that an agent take particular action in order to protect the interests of the principal.
The principal must have been in existence at the time when the agent entered into the contract (*Kelner v Baxter* (1866)).	Authority to act as agent is implied from the particular position held by the individual (*Panorama Developments v Fidelis Furnishing Fabrics Ltd* (1971)).	There must be a genuine emergency (*Great Northern Railway Co v Swaffield* (1874)).
The principal must have had legal capacity to enter into the contract when it was made.	Problems most often occur in relation to the implied extent of a person's authority and can arise in relation to appointment (*Hely-Hutchinson v Brayhead Ltd* (1967)).	There must also be no practical way of obtaining further instructions from the principal (*Springer v Great Western Railway Co* (1921)).

Ratification		Necessity
An undisclosed principal cannot ratify a contract (*Keighley, Maxsted and Co v Durant* (1901)). The principal must adopt the whole of the contract. Ratification must take place within a reasonable time.		The person seeking to establish the agency by necessity must have acted *bona fide* in the interests of the principal (*Sachs v Miklos* (1948)).

Estoppel

Holding out can make a person liable for the actions of a purported agent, although it does not actually create an agency relationship. It arises where the principal has led other parties to believe that a person has the authority to represent him. Then, even although no principal-agency relationship actually exists in fact, the principal is prevented (estopped) from denying the existence of the agency relationship and is bound by the action of his purported agent as regards any third party who acted in the belief of its existence.

To rely on agency by estoppel, the principal must have made a representation as to the authority of the agent (*Freeman and Lockyer v Buckhurst Park Properties Ltd* (1964)).

As with estoppel generally, the party seeking to use it must have relied on the representation (*Overbrooke Estates Ltd v Glencombe Properties Ltd* (1974)).

Nature of agent's authority

Actual authority	Apparent authority
This can arise in either of two ways:	This can also arise in two ways:
(a) express actual authority is explicitly granted by the principal to the agent;	(a) where a representation is made that a person has the authority to act as agent without actually appointing the agent – see agency by estoppel (*Freeman and Lockyer v Buckhurst Park Properties Ltd* (1964));
(b) implied actual authority increases the scope of express authority. Third parties are entitled to assume that agents holding a particular position have all the powers that are usually provided to such an agent (*Watteau v Fenwick* (1893)).	(b) where a principal revokes an agent's authority without informing third parties who had previously dealt with the agent (*Willis Faber and Co Ltd v Joyce* (1911)).

Warrant of authority

If an agent contracts with a third party on behalf of a principal, the agent impliedly guarantees that the principal exists and has contractual capacity and that he has that person's authority to act as his agent. If such is not the case, the agent is personally liable to third parties for breach of warrant of authority (*Yonge v Toynbee* (1910)).

Duties and rights of agents

Duties of an agent	Rights of an agent
To perform the undertaking according to instructions (*Turpin v Bilton* (1843)).	To claim remuneration for services performed. In commercial agreements, the courts will imply a term requiring the payment of a reasonable remuneration.
To exercise due care and skill (*Keppel v Wheeler* (1927)).	To claim indemnity for all expenses legitimately incurred in the performance of services.
To carry out instructions personally.	To exercise a lien over property owned by the principal.
To account.	
Not to permit a conflict of interest to arise (*McPherson v Watt* (1877)).	
Not to make a secret profit or misuse confidential information (*Boardman v Phipps* (1967)).	
Not to take a bribe (*Mahesan v Malaysian Government Officers Co-operative Housing Society* (1978)).	

Where the principal's existence is not disclosed:

(a) the agent can enforce the contract against the third party;

(b) the principal can enforce the contract against the third party;

(c) the third party can choose to enforce the contract against the agent or the principal;

(d) the undisclosed principal cannot ratify any contract made outside of the agent's actual authority;

(e) the principal may be excluded from the contract if the third party had a special reason to contract with the agent (*Greer v Downs Supply Co* (1927));

(f) the third party may not be bound by the contract if the agent misrepresents the identity of the principal (*Archer v Stone* (1898)).

Payment by means of an agent

If the agent does not pay the third party, the principal remains liable.

If the agent absconds with money paid by the third party, then, if the principal is undisclosed, he sustains the loss; if, however, the principal is disclosed, the agent must have had authority to accept money or else the third party is liable.

Termination of agency

Agreements usually may end:

(a) by mutual agreement;

(b) by the unilateral action of one of the parties;

(c) through frustration;

(d) due to the death, insanity or bankruptcy of either of the parties.

9 Partnership law

Definition of partnership

Section 1 of the Partnership Act 1890 (PA) states that 'partnership is the relation which subsists between persons carrying on a business in common with a view to profit'.

Simply receiving a payment from profits is not sufficient automatically to make a person a partner in a business concern.

Legal status of a partnership

A partnership has no separate legal personality apart from its members in the way a joint-stock company does.

Partnerships are generally limited to 20 members; however, certain professional partnerships are exempt from this maximum limit.

Formation of a partnership

There are no specific legal requirements governing the formation of a partnership. Partnerships arise from the agreement of the parties involved and are governed by the general principles of contract law. The PA tends to serve as a default where the partners do not provide for their own operation.

The partnership agreement is an internal document and does not necessarily affect the rights of third parties.

Duties of partners

The legal nature of the partnership involves a complicated mixture of elements of contract, agency and equity:

(a) the partnership agreement is contractual;

(b) partners are, at one and the same time, both agents of the firm and their fellow partners, and principals as regards those other partners;

(c) partners are in a fiduciary position in relation to one another and subject to the equitable rights and duties that derive from that relationship.

Sections 28–30 of the PA lay down specific duties as follows:

(a) the duty of disclosure (s 28; *Law v Law* (1905));

(b) the duty to account (s 29; *Bentley v Craven* (1953));

(c) the duty not to compete (s 30).

Rights of partners

Subject to express provision to the contrary in the partnership agreement, s 24 of the PA sets out the rights of partners. Amongst the most important of these are the rights:

(a) to share equally in the capital and profits of the business;

(b) to be indemnified by the firm for any liabilities incurred or payments made in the course of the firm's business;

(c) to take part in the management of the business;

(d) to have access to the firm's books;

(e) to prevent the admission of a new partner;

(f) to prevent any change in the nature of the partnership business.

Partnership property

It is important to distinguish between partnership property and personal property for the following reasons:

(a) partnership property must be used exclusively for partnership purposes;

(b) any increase in the value of partnership property belongs to the partnership;

(c) any increase in the value of personal property belongs to the person who owns the property;

(d) on the dissolution of the firm, partnership property is used to pay debts before personal property;

(e) partnership and personal property are treated differently in the satisfaction of claims made by partnership creditors as opposed to personal creditors;

(f) on the death of a partner, any interest in partnership land will pass as personalty, whereas land owned personally will pass as realty.

The authority of partners to bind the firm

Each partner has the power to bind co-partners and make them liable on business transactions.

Authority can be actual or implied on the basis of the usual authority possessed by a partner in the particular line of business carried out by the firm (*Mercantile Credit v Garrod* (1962)).

Every partner, other than a limited partner, is presumed to have the implied authority to enter into the following transactions:

(a) to sell the firm's goods;

(b) to buy goods of a kind normally required by the firm;

(c) to engage employees;

(d) to employ a solicitor to act for the firm in defence of an action or in pursuit of a debt.

Partners in trading have the following additional implied powers:

(a) to accept, draw, issue, or indorse bills of exchange or other negotiable instruments on behalf of the firm;

(b) to borrow money on the credit of the firm;

(c) to pledge the firm's goods as security for borrowed money.

Partners' liability on debts

Every partner is responsible for the full amount of the firm's liability: there is no limited liability in ordinary partnerships. Outsiders have the choice of taking action against the firm collectively, or against the individual partners. Where damages are recovered from one partner only, the other partners are under a duty to contribute equally to the amount paid.

Partners may liable for debts, contracts and for torts.

The Limited Partnership Act 1907 allows for the formation of limited partnerships, subject to the following rules:

(a) limited partners are not liable for partnership debts beyond the extent of their capital contribution, but in the ordinary course of events they are not permitted to remove their capital;

(b) one or more of the partners must retain full, ie, unlimited, liability for the debts of the partnership;

(c) a partner with limited liability is not permitted to take part in the management of the business enterprise and cannot usually bind the partnership in any transaction. Contravention of this rule will result in the loss of limited liability;

(d) the partnership must be registered with the Companies Registry.

Partnership by estoppel

Failure to give notice of retirement is one way in which liability arises on the basis of estoppel or 'holding out'. Alternatively, anyone who represents themselves, or knowingly permits themselves to be represented, as a partner is liable to any person who gives the partnership credit on the basis of that representation.

Dissolution of the partnership

Grounds for dissolution are:

(a) the expiry of a fixed term or the completion of a specified enterprise;

(b) the giving of notice;

(c) the death or bankruptcy of any partner;

(d) where a partner's share becomes subject to a charge;

(e) illegality;

(f) where a partner becomes a patient under the Mental Health Act;

(g) where a partner suffers some other permanent incapacity;

(h) where a partner engages in activity prejudicial to the business;

(i) where a partner persistently breaches the partnership agreement;

(j) where the business can only be carried on at a loss;

(k) where it is just and equitable to do so.

Treatment of assets on dissolution

On dissolution, the value of the partnership property is applied in the following order:

(a) in paying debts to outsiders;

(b) in paying to the partners any advance made to the firm beyond their capital contribution;

(c) in paying the capital contribution of the individual partners.

Any residue is divided between the partners in the same proportion as they shared in profits.

10 Company law

Corporations and their legal characteristics

Types of corporations

Companies differ from partnerships in that they are bodies corporate.

Corporations can be created in one of three ways.

By grant of royal charter	By special Act of Parliament	By registration under the Companies Acts
These are governed mainly by the common law. They tend to be restricted to professional, educational and charitable institutions and are not used in relation to business enterprises.	Known as statutory corporations. Although common during the 19th century, particularly in relation to railway and public utility companies, they are not greatly used nowadays, and certainly not by ordinary trading companies.	Since 1844, companies have acquired the status of a corporation simply by complying with the requirements for registration set out in general Acts of Parliament. This is the method by which the great majority of trading enterprises are incorporated.

The doctrine of separate personality

Separate personality: the company exists as a legal person in its own right, completely distinct from the members who own shares in it (*Salomon v Salomon and Co* (1987)).

Consequences of separate personality

Limited liability

This refers to the fact that the potential liability of shareholders is fixed at a maximum level equal to the nominal value of the shares held.

Perpetual succession

This refers to the fact the company continues to exist irrespective of any change in its membership. The company ceases to exist only when it is formally wound up.

The company owns the business property in its own right: shareholders own shares, they do not own the assets of the business they have invested in (*Macaura v Northern Assurance* (1925)).

The company has *contractual capacity* in its own right and can sue and be sued in its own name: members, as such, are not able to bind the company.

The rule in *Foss v Harbottle*

Where a company suffers an injury, it is for the company, acting through the majority of the members, to take the appropriate remedial action; an individual cannot raise an action in response to a wrong suffered by the company.

Lifting the veil of incorporation

There are a number of occasions when the doctrine of separate personality will not be followed.

Under the companies legislation	At common law
Section 24 of the Companies Act 1985 (CA) provides for personal liability of the member where a company carries on trading with fewer than two members.	The courts will not permit the corporate form to be used for a clearly fraudulent purpose or to evade a legal duty (*Gilford Motor Co Ltd v Horne* (1933)).
Section 229 requires consolidated accounts to be prepared by a group of related companies.	The courts are prepared to ignore separate personality in times of war where shareholders are enemy aliens (*Daimler Co Ltd v Continental Tyre and Rubber Co (GB) Ltd* (1917)).
Section 213 of the Insolvency Act 1986 provides for personal liability in relation to fraudulent trading.	
Section 214 does the same in relation to wrongful trading.	In groups of companies the courts will usually not ignore the separate existence of the various companies unless they are being used for fraud (*DHN Food Distributors Ltd v Borough of Tower Hamlets* (1976); but also *Woolfson v Strathclyde RC* (1978); and *National Dock Labour Board v Pinn and Wheeler* (1989)).

Types of companies

Although the distinction between public and private companies is probably the most important, there are a number of ways in which companies can be classified, as follows.

Unlimited companies	Limited companies
Companies can be formed without limited liability. They get all the benefits of incorporation except limited liability.	The maximum liability of shareholders is fixed and cannot be increased without their agreement.

Limited and Unlimited companies

Limited liability may be created in two ways, as shown in the following diagram.

By shares	By guarantee
Liability is limited to the amount remaining unpaid on shares held. If the full nominal value of the shares is paid, then shareholders have no further responsibility for company debts.	Usually restricted to non-trading enterprises, such as charities and professional and educational bodies. Liability is limited to an agreed amount which is only called on if the company cannot pay its debts on being wound up.

Public and private companies

Private companies	Public limited companies
Tend to be small scale enterprises owned and operated by a small number of individuals.	Tend to be large, and are usually controlled by directors and managers rather than owners.
They cannot offer their shares to the public at large. Their shares are not quoted on any share market and tend not to be freely transferable.	They are sources of investment and have freely transferable shares which are quoted on the Stock Exchange.

Legal differences between public and private companies

Public and private companies differ in that:

(a) public companies must have at least two directors, whereas private companies need only have one;

(b) public companies have minimum-issued and paid-up capital;

(c) the requirement to keep accounting records is shorter for private companies;

(d) the controls over distribution of dividend payments are relaxed in relation to private companies;

(e) private companies may purchase their own shares out of capital, but public companies cannot;

(f) private companies can provide financial assistance for the purchase of their own shares, but public companies cannot;

(g) there are fewer and looser controls over directors in

private companies, as regards their financial relationships with their companies;

(h) private companies can make use of written resolutions; private companies may also pass elective resolutions.

Registration

A registered company is incorporated when particular documents are delivered to the registrar of companies (s 10).

On registration of these documents the registrar issues a certificate on incorporation (s 13).

A private company may start its business as soon as the certificate of registration is issued. A public company, however, cannot start business until it has obtained an additional certificate from the registrar under s 117.

Documents required under s 10 are:

(a) a memorandum of association;

(b) articles of association (unless Table A articles are to apply);

(c) a statement detailing the first directors and secretary of the company, with their written consent and the address of the company's registered office;

(d) a statutory declaration that the necessary requirements of the CA have been complied with.

The constitution of the company

The constitution of a company is established by two documents: the memorandum of association and the articles of association. If there is any conflict between them, the contents of the memorandum prevail over anything to the contrary contained in the articles.

The memorandum of association	The articles of association
This governs the company's external affairs and must contain the following clauses:	These regulate the internal workings of the company.
(a) *name clause*: private companies are required to end their names either with the word 'Limited' or the abbreviation 'Ltd'; and public companies must end their names with the words 'public limited company' or the abbreviation 'plc';	They form a contract between: (a) the company and the company; (b) the members and the company; (c) the members.
(b) *registered office clause*: this states the company's legal address; (c) *objects clause*: companies can now register as 'a general commercial company' which will empower them to 'carry on any trade or business whatsoever' (s 3A);	They deal with such matters as the allotment and transfer of shares, the rights attaching to particular shares, the rules relating to the holding of meetings, and the powers of directors.
(d) *limited liability clause*: states that the liability of the members is limited; (e) *authorised share capital clause*: states the maximum amount of share capital that a company is authorised to issue.	Companies can draw up their own articles or use Table A model articles. If articles are not submitted then Table A applies automatically.

The memorandum of association	The articles of association
Association clause: states that the subscribers to the memorandum wish to form a company. Public companies must have a clause stating that they are public companies.	Articles can be altered by the passing of a special resolution as long as it is done *'bona fide in the interest of the company as a whole'* (*Greenhalgh v Arderne Cinemas Ltd* (1951); *Brown v British Abrasive Wheel Co* (1919); *Sidebottom v Kershaw Leese and Co* (1920)).

Capital

The money companies need to finance their operation may be raised in the form of share capital or loan capital.

Share capital

A share has been defined as 'the interest of the shareholder in the company measured by a sum of money, for the purposes of liability in the first place and of interest in the second, but also consisting of a series of mutual covenants entered into by all the shareholders' (*Borland's Trustees v Steel* (1901)).

Types of shares

Shares can be divided into ordinary, preference, and redeemable shares.

Ordinary shares	Preference shares	Redeemable shares
These carry the greatest risk, but in recompense receive the greatest return.	These may have priority over ordinary shares in respect to dividends and re-payment. They carry a fixed rate of dividend.	These are issued on the basis that they may be bought back later by the company. Companies can now purchase their own shares, and are no longer restricted to buying redeemable shares.

Loan capital

The term *debenture* refers to the document which acknowledges the fact that a company has borrowed money, and also refers to the actual debt.

Debentures differ from shares in the following respects:

(a) debenture holders are creditors of the company; they are not members as shareholders are;

(b) as creditors, debenture holders receive interest on their loans; they do not receive dividends as shareholders do;

(c) debenture holders are entitled to receive interest whether the company is profitable or not, even if the payment is made out of the company's capital;

(d) debenture holders may be issued at a discount.

Company charges

Debentures usually provide security for the amount loaned. There are two types of security for company loans, as shown below.

Fixed charge	Floating charge
A specific asset of the company is made subject to a charge in order to secure a debt.	A floating charge does not attach to any specific property of the company until it crystallises.
The company cannot thereafter dispose of the property without permission.	The security is provided by all the property owned by the company, some of which may be continuously changing.
If the company fails to honour its commitments, then the debenture holders can sell the asset to recover the money owed.	It permits the company to deal with its property without the need to seek permission.

Registration of charges

All charges have to be registered with the Companies Registry within 21 days of their creation. If not registered, then a charge is void against any other creditor, or the liquidator of the company, but it is still valid against the company.

In addition, companies are required to maintain a register of all charges on their property.

Priority of charges

Charges of the same type take priority according to their date of creation. As regards charges of different types, a fixed charge takes priority over a floating charge, even though it was created after it.

Directors

The board of directors is the agent of the company and may exercise all the powers of the company. Individual directors may be described as being in a *fiduciary relationship* with their companies.

Appointment of directors

The first directors are usually named in the articles or memorandum. Subsequent directors are appointed under the procedure stated in the articles. The usual procedure is for the company in general meeting to elect the directors by an ordinary resolution.

Casual vacancies are usually filled by the board of directors co-opting someone to act as director. That person then serves until the next *annual general meeting,* when they must stand for election in the usual manner.

Removal of directors

There are a number of ways in which a person may be obliged to give up their position as a director, shown below.

Rotation	Retirement	Removal
Table A provides that one-third of the directors shall retire at each AGM, being those with longest service. They are, however, open to re-election.	Directors of public companies are required to retire at the first AGM after their 70th birthday.	A director can be removed at any time by the passing of an ordinary resolution of the company (s 303 of the CA). The company must be given special notice (28 days) of the intention to propose such a resolution. The power to remove a director under s 303 cannot be removed, but it can be avoided in private companies by the use of weighted voting rights (*Bushell v Faith* (1969)).

Disqualification

The articles of association usually provide for the disqualification of directors on: bankruptcy, mental illness, or prolonged absence from board meetings.

In addition, individuals can be disqualified from acting as directors for up to a maximum period of 15 years under the Company Directors Disqualification Act 1986.

Grounds for disqualification include:

(a) persistent breach of the companies legislation;

(b) committing offence in relation to companies;

(c) fraudulent trading;

(d) general unfitness.

Power of directors as a board

Article 70 of Table A provides that the directors of a company may exercise all the powers of the company. This power is given to the board as a whole and not to individual directors, although Art 72 does allow for the delegation of the board's powers to one or more directors.

The power of individual directors

There are three ways in which the power of the board of directors may be extended to individual directors.

Express actual authority	Implied actual authority	Apparent authority
This arises from the express conferral by the board of a particular authority onto an individual director. For example, it is possible for the board to authorise an individual director specifically to negotiate and bind the company to a particular transaction.	This flows from the person's position. Appointment as managing director will give that person the *implied authority* to bind the company in the same way as the board, whose delegate they are (*Hely-Hutchinson v Brayhead Ltd* (1968)).	Where a director is held out by the other members of the board as having the authority to bind the company, if a third party acts on such a representation, the company will be estopped from denying its truth (*Freeman and Lockyer v Buckhurst Park Properties (Mangal) Ltd* (1964)).

Directors' duties

As fiduciaries, directors owe the following duties to their company:

(a) the duty to act *bona fide* in the interests of the company: directors are under an obligation to act in what they genuinely believe to be the interest of the company;

(b) the duty not to act for any collateral purpose: directors cannot be said to acting *bona fide* if they use their powers for some ulterior or collateral purpose (*Howard Smith v Ampol Petroleum* (1974); and *Hogg v Cramphorn* (1967)). The breach of such a fiduciary duty is capable of ratification (*Bamford v Bamford* (1970));

(c) the duty not to permita conflict of interest and duty to arithis rule is strictly applied by the courts (*Regal (Hastings) v Gulliver* (1942)).

Duty of care and skill

Common law did not place any great burden on directors in this regard. *Re City Equitable Fire Assurance Co* (1925) estblished three points.

(a) a subjective test meant that a director was expected to show the degree of skill which might be reasonably expected of a person of their knowledge and experience;

(b) the duties of directors were held to be of an intermittent nature and they were not required to give continuous attention to the affairs of their company;

(c) in the absence of any grounds for suspicion, directors were entitled to leave the day to day operation of the company's business in the hands of managers.

Statute introduced wrongful trading by s 214 of the insolvency Act 1986. Section 214 applies where a company is being wound up and it appears that at some time before the start of the winding up, a director knew, or ought to have known, that there was no reasonable chance of the company avoiding insolvent liquidation. In such step to minimise the potential loss to the company's creditors, they may be liable to contribute such money to the assets of the company as the court thinks proper (*Re Produce Marketting Consortium Ltd* (1989)).

Company secretary

Section 744 of the CA includes the company secretary amongst the officers of a company. Every company must have a company secretary and although there are no specific qualifications required to perform such a role in a private company, s 286 of the CA requires that the directors of public company must ensure that the company secretary has the requisite knowledge and experience to discharge their functions. Section 286(2) sets out a list of professional bodies, membership of which enables a person to act as a company secretary.

Although old authorities, such as *Houghton and Co v Northard Lowe and Wills* (1928) suggest that company secretaries have extremely limited authority to bind their company, later cases have recognised the reality of the contemporary situation, whereby company secretaries potentially have extensive powers to bind their companies (*Panorama Developments Ltd v Fidelis Furnishing Fabrics Ltd* (1971)).

Company meetings

There are three types of meeting.

Annual general meeting	Extraordinary general meeting	Class meeting
Every company is required to hold an annual general meeting (AGM) every calendar year, subject to a maximum period of 15 months. Private companies, subject to approval by a unanimous vote, may dispense with the holding of annual general meetings.	An extraordinary general meeting (EGM) is any meeting other than an AGM. EGMs are usually called by the directors, although members holding 10% of the voting shares may requisition such a meeting.	This refers to the meeting of a particular class of shareholder, ie, those who hold a type of share providing particular rights, such as preference shares.

Types of resolutions

There are essentially three types of resolution.

Ordinary resolution	Extraordinary resolution	Special resolution
This requires a simple majority of those voting. Members who do not attend, or who attend but do not vote, are disregarded. Notice in relation to an ordinary resolution depends on the type of meeting at which it is proposed, 21 days for an AGM and 14 days for an EGM. In relation to an ordinary resolution to remove a director, the company must be given special notice of 28 days.	This requires a majority of not less than three quarters of those voting. An extraordinary resolution requires a minimum of 14 days' notice, but if it is to be voted on at an AGM, notice of 21 days will be required.	This also requires a majority of not less than three quarters, but in all circumstances, members must be given 21 days' notice of its contents.

Private companies can pass *elective resolutions* to dispense with particular formalities such as laying accounts before the AGM or, indeed, holding the AGM. They require the unanimous approval of the members.

Majority rule and minority protection

The majority usually dictate the action of a company and the minority is usually bound by the decisions of the majority (*Foss v Harbottle* (1843)). Problems arise where those in effective control of a company use their power to benefit themselves or cause a detriment to the minority shareholders.

Problems may arise where those in effective control of a company use their power in such a way as either to benefit themselves or cause a detriment to the minority shareholders. In the light of such a possibility, the law has intervened to offer protection to minority shareholders. The source of the protection may be considered in three areas:

(a) *fraud on the minority*: it has long established at common law that those controlling the majority of shares are not to be allowed to use their position of control to perpetrate what is known as a fraud on the minority. In such circumstances, the individual shareholder will be able to take legal action in order to remedy their situation (*Cook v Deeks* (1916));

(b) *just and equitable winding up*: s 122(g) of the Insolvency Act 1986 gives the court the power to wind up a company if it considers it just and equitable to do so (*Re Yenidje Tobacco Co Ltd* (1916));

(c) *unfairly prejudicial conduct*: under s 459 of the CA, any member may petition the court for an order on the grounds that the affairs of the company are being conducted in a way that is unfairly prejudicial to the interests of some of the members. Section 461 gives the court general discretion as to any order it makes to remedy the situation (*Re London School of Electronics*

(1986); *Re Bird Precision Bellows Ltd* (1984); *Re Sam Weller and Sons Ltd* (1990)).

In addition to the above remedies, the Secretary of State has the power under s 431 of the CA to appoint inspectors to investigate the affairs of a company.

Winding up and administration

Liquidation is the process whereby the life of the legal person the company is brought to an end.

There are three possible procedures:

(a) compulsory winding up;

(b) members' voluntary winding up;

(c) creditors' voluntary winding up.

Administration

This is a relatively new procedure, aimed at saving the business as a going concern by taking control of the company out of the hands of its directors and placing it in the hands of an of an administrator. Alternatively, the procedure is aimed at maximising the realised value of the business assets.

Once an administration order has been issued, it is no longer possible to commence winding up proceedings against the company or enforce charges, retention of title clauses or even hire purchase agreements against the company.

Insider dealing

This is governed by Pt V of the Criminal Justice Act 1993 (CJA) which repeals and replaces the Company Securities (Insider Dealings) Act 1985.

Section 52 of the CJA states that an individual who has information as an insider is guilty of insider dealing if they deal in securities that are price affected in relation to the information. They are also guilty of an offence if they encourage others to deal in securities that are linked with this information.

Section 56 makes it clear that securities are 'price affected' in relation to inside information if the information would, if made public, be likely to have a significant effect on the price of those securities.

Section 57 defines an insider as a person who knows that they have inside information and knows that they have the information from an inside source. This section also states that 'inside source' refers to information acquired through being a director, employee or shareholder of an issuer of securities, or having access to information by virtue of their employment. Additionally, and importantly, it also treats as insiders those who acquire their information from those primary insiders previously mentioned.

There are a number of defences to a charge of insider dealing. For example, s 53 makes it clear that no person can be so charged if they did not expect the dealing to result in any profit or the avoidance of any loss.

On summary conviction, an individual found guilty of insider dealing is liable to a fine not exceeding the statutory maximum and/or a maximum of six months' imprisonment. On indictment, the penalty is an unlimited fine and/or a maximum of seven years' imprisonment.

11 Negligence

If a person injures another or damages property as a result of his negligent actions, he may be liable to pay compensation for this damage. However, to be liable in negligence the claimant must show on a balance of probabilities the following:

(a) duty of care;

(b) breach of duty;

(c) resultant damage.

Duty of care

The defendant must take reasonable care to avoid acts and omissions which could reasonably be foreseen to injure his or her neighbour. A neighbour is defined as someone so closely and directly affected by the act of the defendant that they would reasonably have been in contemplation as being so affected (*Donoghue v Stevenson* (1932)).

A three stage test was expounded in *Caparo Industries plc v Dickman* (1990):

(a) Was the harm caused reasonably foreseeable?

(b) Was there a relationship of proximity between the defendant and the claimant?

(c) In all the circumstances, is it just, fair and reasonable to impose attentive care?

This approach was supported in *Marc Rich v Bishop Rock Marine* (1995).

Policy reasons therefore may acceptably limit the existence of the duty of care (*Hill v Chief Constable of West Yorkshire* (1990)).

Nervous shock

Where the claimant claims damages for nervous shock, the question of proximity between the claimant and defendant may be critical to the success of that claim. Nervous shock or post-traumatic stress disorder must take the form of a recognised mental illness and this type of injury must be reasonably foreseeable:

(a) passers-by may be expected to have the 'necessary phlegm and fortitude' not to suffer nervous shock as a result of seeing the aftermath of an accident (*Bourhill v Young* (1943));

(b) fear for one's own safety may provide grounds for a claim (*Dulieu v White* (1991));

(c) fear for the safety of a close relative may also be acceptable (*Hambrook v Stokes Bros* (1925); *McLoughlin v O'Brian* (1982)).

The definitive test is to be found in *Alcock and Others v Chief Constable of South Yorkshire* (1991), which established that there must be:

(a) a close and loving relationship with the victim;

(b) proximity in time and place to the accident or its aftermath;

(c) nervous shock resulting from seeing or hearing the accident or its immediate aftermath.

A claim may be upheld where the claimant sees injury to others, even though he or she is in no danger, particularly where they are involved in or are responsible for the incident (*Dooley v Cammell Laird and Co* (1951); *Hunter v British Coal Corp* (1998)).

Rescuers are not to be regarded as mere bystanders and may succeed in a claim for nervous shock (*Chadwick v British Railways Board* (1967); *Frost v Chief Constable of South Yorkshire* (1997)).

Economic loss

Economic loss arising out of physical injury or damage to property is recoverable (*Spartan Steel and Alloys Ltd v Martin and Co* (1973); *London Waste v Amec* (1997)). However, pure economic loss is not (*Murphy v Brentwood DC* (1990)), unless it is as the result of a negligent misstatement.

Negligent misstatements

A defendant may be liable for economic loss resulting from a negligent misstatement where a special relationship is established between the defendant and the claimant (*Hedley Byrne and Co v Heller and Partners* (1964)). A duty of care exists in this situation where 'one party seeking information and advice is trusting the other to exercise such a degree of care as the circumstances required, where it was reasonable for him to do that and where the other party gave the information or advice when he knew or ought to have known the inquirer was relying on him'.

There may be concurrent liability in tort and contract for such statements (*Henderson v Merritt Syndicates Ltd* (1994)):

(a) there is, in general, no liability for information given on a purely social occasion;

(b) friends or acquaintances utilising skills of their profession may be liable for negligent advice (*Chaudhry v Prabhakar* (1989));

(c) professionals such as accountants, lawyers and surveyors may be liable when acting in a professional capacity, although there may be limits on the extent of their liability (*Caparo Industries plc v Dickman* (1990); *White v Jones* (1995); *Smith v Eric Bush* and *Harris v Wyre Forest District Council* (1989)).

Breach of duty of care

Once the claimant has established that the defendant owes him a duty of care, he must then establish that the defendant is in breach of this duty. A breach occurs if the defendant:

> …fails to do something which a reasonable man guided upon those considerations which ordinarily regulate the conduct of human affairs would do, or does something which a prudent and reasonable man would not do [*Blyth v Birmingham Water Works Co* (1856)].

In establishing a breach of duty the following factors are relevant:

(a) the likelihood of injury: the greater the risk of injury the higher the standard of care (*Bolton v Stone* (1951));

(b) knowledge about the claimant (*Paris v Stepney BC* (1951));

(c) cost and practicability: if the cost of taking precautions far outweighs the risk, the standard of care will have been satisfied (*Latimer v AEC Ltd* (1952));

(d) social utility: the degree of risk has to be balanced against the social utility and importance of the defendant's activity (*Watt v Hertfordshire CC* (1954));

(e) common practice: as long as the common practice is not inherently negligent, the standard of care may be satisfied;

(f) skilled persons: the actions of the skilled person must be judged against the ordinary skilled man in that particular job or profession (*Bolam v Friern HMC* (1957));

(g) *res ipsa loquitur:* whilst the burden of proof normally rests on the claimant, negligence may be inferred from the facts. This will occur where the only explanation for what happened is the negligence of the defendant, yet the claimant has insufficient evidence to establish the defendant's negligence in the normal way. The following criteria must be satisfied:

- the defendant must have had sole management or control of the thing causing the damage;
- the occurrence could not have happened without negligence (*Widdowson v Newgate Meat Corpn* (1997));
- the cause of the occurrence is unknown (*Pearson v NW Gas Board* (1968)). The defendant can rebut the presumption of negligence by providing a satisfactory explanation.

Causation

The claimant must then show that 'but for' the defendant's actions the damage would not have happened—this is known as causation in fact. If the same result would have occurred regardless of the breach, then it is unlikely that the breach caused the injury (*Barnett v Chelsea and Kensington HMC* (1969)):

(a) the defendant's breach must be a material contributory cause of the injury (*Wilsher v Essex AHA* (1988));

(b) where there are successive tortfeasors, the courts will have to decide how far each one is responsible for the damage caused (*Baker v Willoughby* (1970));

(c) a *novus actus interveniens* (new intervening act) may break the chain of causation, allowing the defendant to avoid liability for damage caused after the breach. There are three recognised categories of *novus actus:*

- unforeseen natural event (*Carslogie Steamship Co Ltd v Royal Norwegian Government* (1952));
- the act of a third party (*Lamb v Camden LBC* (1981));
- the act of the claimant (*McKew v Holland Hannan and Cubbits (Scotland) Ltd* (1969)).

Remoteness of damage

Even where causation is established, the defendant will only be liable for damage which is reasonably foreseeable. If the type of harm is foreseen, the defendant will be liable (*The Wagon Mound (No 1)* (1961); *Hughes v Lord Advocate* (1963); *Doughty v Turner Manufacturing Co Ltd* (1964)).

However, if the harm is foreseeable, the defendant will be liable even where the claimant has some weakness or susceptibility (*Smith v Leech Brain & Co* (1961); *Robinson v Post Office* (1974)).

Defences

The liability of the defendant may be reduced or limited by the following:

(a) contributory negligence: this occurs where the claimant is found to have contributed in some way to his injury;

(b) *volenti non fit injuria* (consent): this may be a defence where the claimant is found to have freely assented to the risk of a tort being committed.

12 Employer's liability

Employer's liability is a negligence-based tort. Employers are, therefore, under a duty to take reasonable care for the safety of their employees whilst they are at work. An injured employee who wishes to pursue an action based on the liability of his employer must establish the following:

(a) duty of care;

(b) breach of duty of care;

(c) causation and resultant damage.

Duty of care

The employer's duty of care is owed to each individual employee. It is a personal duty and is non-delegable (*Wilsons and Clyde Coal Co v English* (1938)).

The duty is owed whilst the employee is acting within the course of his employment (*Davidson v Handley-Page Ltd* (1945)).

The employer's duty extends to the following:

(a) the provision of competent fellow employees (*O'Reilly v National Rail and Tramway Appliances Ltd* (1966); *Hudson v Ridge Manufacturing Co Ltd* (1957));

(b) the provision and maintenance of safe plant and appliances (*Bradford v Robinson Rentals Ltd* (1967)): see also the Employer's Liability (Defective Equipment) Act 1969, which provides that the employer will be deemed to be negligent for defective equipment supplied by a third party;

(c) the provision of a safe place of work: this includes any premises under the control of the employer including access and egress (*Wilson v Tyneside Window Cleaning Co* (1958); *Smith v Vange Scaffolding and Engineering Co Ltd* (1970));

(d) the provision of a safe system of work: this extends to the physical layout of the job, training, supervision, safe working practices. It also encompasses claims for stress at work and work related upper limb disorders (*Pickford v Imperial Chemical Industries plc* (1998); *Walker v Northumberland CC* (1994); *King v Smith* (1995)).

Breach of duty

The claimant must establish that the employer failed to act as a reasonable employer. The standard of care is subject to the following:

(a) the likelihood of injury (*Paris v Stepney BC* (1951));

(b) egg-shell skull rule (*James v Hepworth and Grandage Ltd* (1968);

(c) the nature of the hazard balanced against the risk of injury (*Hawkins v Ian Ross (Castings) Ltd* (1970)).

Causation and resultant damage

As with claims for negligence, the claimant must satisfy the 'but for' test and also show that the damage was reasonably foreseeable (*Doughty v Turner Manufacturing* (1964); *Smith v Leech Brain and Co* (1962); see also Chapter 11).

Vicarious liability

An employer will be vicariously liable for torts committed by his employee whilst that employee is acting within the course of his employment. The claimant must, however, establish the following:

(a) an employer/employee relationship;

(b) the commission of a tort by the employee;

(c) the commission of the tort whilst the employee was either carrying out his or her job, or carrying out something reasonably incidental to that job (*Century Insurance Co Ltd v Northern Ireland Road Transport Board* (1942));

(d) a prohibited act done for the purpose of the employer's business may still result in the employee being within the course of employment (*Rose v Plenty* (1976));

(e) an employer may not, however, be liable for an unforeseen act which is deemed to be a 'frolic of one's own' (*Harrison v Michelin Tyre Co Ltd* (1985); *Heasmans v Clarity Cleaning Co Ltd* (1987));

(f) the employer may be liable for a breach of a position of trust on the part of the employee (*Morris v Martin and Sons Ltd* (1966); *Lloyd v Grace, Smith and Co* (1912)).

13 Individual employment rights 1

There are a wide range of employment rights available to full time employees, at least in theory; however, as the number of part time employees increases, the extension of these rights to part time employees becomes a serious issue.

Contract of employment

The relationship between the employee and the employer is governed by the contract of employment, which forms the basis of the employee's employment rights. Employees are employed under a contract of employment or contract of service, whereas self-employed persons are employed under a contract for services. The following tests enable the court to distinguish between the two types of contract:

(a) Control test

An employer should control not only what the employee does but how he does it (*Walker v Crystal Palace FC* (1910)).

(b) Integration test

An employee will be fully integrated into the employer's business, whereas an independent contractor does not become part of the employer's business (*Stevenson, Jordan and Harrison Ltd v MacDonald and Evans* (1952); *Whittaker v Minister of Pensions and National Insurance* (1967); *Cassidy v Minister of Health* (1951)).

(c) Multiple test

This considers factors in a contract which are consistent with the existence of a contract of employment. The following conditions should be fulfilled:

- that the employee provides his own work and skill in return for a wage or remuneration;
- that the employee is under a sufficient degree of control of the employer;
- that the other provisions of the contract are consistent with the existence of a contract of service (*Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance* (1968); *Market Investigations Ltd v Minister of Social Security* (1969); *Hall v Lorimer* (1994)).

Other issues may be:

(a) Who pays the income tax and national insurance?

(b) Is the person employed entitled to holiday pay?

(c) Who is responsible for the overall safety of the person in question (*Lane v Shire Roofing Co (Oxford) Ltd* (1995))?

(d) Mutuality of obligations (*O'Kelly v Trusthouse Forte plc* (1983); what is the custom and practice of the particular industry (*Wickens v Champion Employments* (1984); *Nethermore (St Neots) v Gardiner and Tavernor* (1984))?

Loaning or hiring out of employees

The presumption is that where an employee is loaned or hired out, he remains the employee of the first employer (*Mersey Docks and Harbour Board v Coggins and Griffiths (Liverpool) Ltd* (1947)). However, the presumption can be rebutted (*Sime v Sutcliffe Catering* (1990)).

'Employee' is defined in the Employment Rights Act 1996 (ERA) as an individual who has entered into, or works under, a contract of employment (s 230(1)).

Formation of the contract of employment

With regard to contracts of employment:

(a) they can be made orally or in writing, with the exception of apprenticeship deeds and articles for merchant seamen;

(b) the employer must provide written particulars of the main terms within two months of the date on which employment commenced (Pt 1 of the ERA). The particulars must contain the following:

- names of the parties;
- date on which employment commenced;
- rate of pay or method of calculating it;
- intervals at which wages are to be paid;
- terms and conditions relating to hours of work;
- terms and conditions relating to holidays and holiday pay;
- length of notice;
- job title and description;
- place of work;
- any collective agreement directly affecting the terms and conditions;
- details of any work to be carried on outside the UK.

The written particulars must also refer to the following documents:

- the disciplinary rules;
- the disciplinary procedure;
- the grievance procedure;
- rights relating to sick pay and pensions scheme.

Express terms

These are terms agreed between the employer and employee on entering the contract of employment.

Implied terms

These arise out of custom and practice of a particular industry.

Duties imposed on the employer

(a) To provide work

The employer should provide the employee with the opportunity to work, or if no work is available, then this duty may be satisfied by the payment of wages (*Devonald v Rosser and Sons* (1986); *Collier v Sunday Referee Publishing Co Ltd* (1940)).

(b) To pay wages

Every employee is entitled to an itemised pay statement showing gross salary, deductions and net salary. Any deductions from wages must either be authorised by statute or by a provision in the employee's contract. The employer must pay his employees' wages even if there is no work available.

(c) To indemnify the employee

(d) To treat an employee with mutual respect

See *Donovan v Evicta Airways Ltd* (1970); *WA Goold Pearmak Ltd v McConnell and Another* (1995).

(e) To provide for the care and safety of the employee

See Chapter 12.

Duties imposed on the employee

The duties of the employee are to:

(a) obey lawful and reasonable orders (*Pepper v Webb* (1969));

(b) act faithfully (*Faccenda Chicken Ltd v Fowler* (1986); *Nova Plastics Ltd v Froggatt* (1982); *Hivac Ltd v Park Royal Scientific Instruments Ltd* (1946); *Adamson v B and L Cleaning Services Ltd* (1995));

(c) use skill and care in the performance of his job (*Lister v Romford Ice and Cold Storage Co Ltd* (1957));

(d) not take bribes or make a secret profit (*Sinclair v Neighbour* (1967); *Reading v AG* (1951)).

Equal pay

Legislation governing equal pay:

(a) Art 141 (formerly Art 119) of the EC Treaty;

(b) Directive 75/117;

(c) Equal Pay Act 1970 (EPA).

An equality clause which has the effect of equalising terms and conditions in a man and woman's contract of employment is implied into all contracts of employment (s1(1) of the EPA).

Under Art 141, 'pay' includes 'any consideration in cash or in kind', eg, sick pay (*Rinner-Kuhn v FWW Spezial-Gebäudereinigung* (1989)); concessionary travel (*Garland v British Rail Engineering Ltd* (1982)).

Each term of the contract should be considered individually, and where less favourable than the comparative term, it should be equalised (*Hayward v Cammell Laird Shipbuilders Ltd* (1988)).

Claiming equality

The applicant must show:

(a) employment under a contract of service or under a contract for services (s 1(6) of the EPA; *Mirror Group Newspapers Ltd v Gunning* (1986));

(b) employment by the same employer at the same establishment, or by the same employer or an associated employer at an establishment where common terms and conditions are observed (s 1(6); *Leverton v Clwyd CC* (1989); *British Coal Corp v Smith* (1996), which concluded that common terms and conditions meant terms and conditions which are comparable substantially on a broad basis). 'Same establishment' has been held to include service (Art 141) (*Scullard v Knowles and South Regional Council for Education and Training* (1996)).

(c) the comparator is of the opposite sex (for sex discrimination claims);

(d) the comparator may be a predecessor (*McCarthys v Smith* (1980));

(e) the comparator may now be a successor (*Diocese of Hallam Trustee v Connaughton* (1996)).

Grounds of claim

Grounds for claim include:

(a) Like work (s 1(2)(a) of the EPA)

An applicant may claim like work where they are employed on the same work or work of a broadly similar nature as their comparator (s 1(4) of the EPA; *Capper Pass Ltd v Lawton* (1977)):

- differences of practical importance cannot be ignored (*Eaton Ltd v Nuttall* (1977));
- the time at which work is done is generally irrelevant (*Dugdale v Kraft Foods Ltd* (1977); *Thomas v NCB* (1987));
- what is actually done in practice, rather than theory, will be considered (*Shields v Coomes (Holdings) Ltd* (1978)).

(b) Work rated equivalent (s 1(2)(b) of the EPA)

An applicant may bring a claim where her job has been rated as equivalent to that of her male comparator under a job evaluation scheme (*Bromley v H and J Quick Ltd* (1988); *Eaton Ltd v Nuttall* (1977)).

(c) Equal value

The work of equal value provision allows the applicant to claim the same pay as her male comparator if she is doing work of the same value in

terms of the demands made on her (s 1(2)(c) of the EPA):

- an equal value claim may be made, even though there is a man employed in the same job as the woman (*Pickstone v Freemans plc* (1988));
- in determining whether work is of equal value, the ET tend to take a broad brush approach (*Pickstone v Freemans plc* (1993));
- work of a higher value to the comparator is also covered by an equal value claim (*Murphy v Bord Telecom Eireann* (1988));
- the procedure in equal value claims is complex (see the following diagram).

Procedure for equal value cases

DIRECTIONS HEARING

INITIAL HEARING

Are there reasonable grounds for determining the work is of equal value?

Consideration of the material factor defence

Should the claim be referred to an independent expert, or can the IT determine the outcome itself?

REFERENCE TO AN INDEPENDENT EXPERT

The IE will determine whether the work of the woman and the man is of equal value

Provide a date by which the IE will report to the IT

FOLLOWING THE IE'S REPORT, THE HEARING IS RESUMED

Genuine material factor defence

This defence allows the employer to prove that the variation in pay is genuinely due to a material factor which is not based on the difference in the sex of the applicant and her comparator. This is an objective test.

The burden of proof is on the applicant to establish that his or her work falls within either the like work, work-rated equivalent, or work of equal value provisions.

The employer may raise the genuine material difference/factor defence either at the preliminary hearing or at the full hearing, although it can no longer be pleaded at both.

The following may amount to a genuine material difference/factor:

(a) red circled agreements: these allow the employer to protect an employee's or group of employees' salaries, even though he or they may have been moved to a lower grade of work (*Snoxall v Vauxhall Motors Ltd* (1977));

(b) different geographical areas (*NAAFI v Varley* (1977));

(c) seniority and experience (*Nimz v Freie und Hansestadt Hamburg* (1991));

(d) market forces (*Rainey v Greater Glasgow Health Board* (1987));

(e) factors not tainted by discrimination (*Strathctyde Regional Council v Wallace* (1998)).

The following may not be a defence to a claim for equal pay:

(a) compulsory competitive tendering (*Ratcliffe v North Yorkshire CC* (1995));

(b) collective bargaining and separate pay structures (*British Coal Corpn v Smith* (1996); *British Road Services v Loughrin* (1997));

(c) a lack of transparency in pay systems may defeat the genuine material difference defence (*Handels -og Kontorfunktionaerernes Forbund i Danmark v Dansk Arbejdsgiverforening (acting for Danfoss)* (1989)).

Remedies

Remedies for sex discrimination include:

(a) compensation limit of up to two years' back pay. This limit has been challenged as being contrary to EC law (*Levez v PH Jennings (Harlow Pools) Ltd* (1997));

(b) claim must be brought within six months of the termination of employment.

Sex and race discrimination

Sources

Provisions regarding sex and race discrimination are to be found in:

(a) Directive 76/207; Sex Discrimination Act 1975 (SDA);

(b) Race Relations Act 1976 (RRA);

(c) Disability Discrimination Act 1995 (DDA).

Who is protected?

The legislation covers anyone intending to be employed under a contract of employment.

Types of unlawful discrimination

Discrimination is unlawful if it is based upon:

(a) sex/gender;

(b) racial grounds/group;

(c) marital status;

(d) disability.

The definition of 'racial grounds' is to be found in s 3(1) of the RRA. This is defined as any of the following:

(a) colour;

(b) race;

(c) nationality;

(d) ethnic or national origins (*Northern Joint Police Board v Power* (1997); *Dawkins v Department of the Environment* (1993)).

The test for establishing 'ethnic origin' can be found in *Mandla v Dowell Lee* (1983)).

The essential characteristics are:

(a) a long shared history;

(b) a cultural tradition;

(c) a common geographical area;

(d) descent from a number of common ancestors;

(e) a common language;

(f) a common literature;

(g) a common religion;

(h) being a minority or being an oppressed or dominant group within the larger community.

Direct discrimination

Direct discrimination covers both overt and covert acts against the individual. The test for establishing direct discrimination was established in *R v Birmingham CC ex p EOC* (1989); supported by the decision in *James v Eastleigh BC* (1990).

The test is as follows:

(a) Has there been an act of discrimination?

(b) If the answer is in the affirmative, but for the sex, race or disability of the complainant, would he or she have been treated more favourably?

The intention of the discriminator is irrelevant (*Grieg v Community Industry* (1996)).

Direct discrimination may be inferred from the facts of the case, particularly where the employer cannot provide a legitimate reason for his actions (*Noone v North West Thames RHA* (1988)).

The RRA recognises transferred discrimination. For example, if a white barmaid is instructed to refuse to serve black people, and on refusing to do so is dismissed, she can claim direct discrimination under the RRA (*Zarcynska v Levy* (1978); *Weatherfield Ltd t/a Van and Truck Rentals v Sargent* (1998)).

Sexual and racial harassment

Note that:

(a) harassment is a form of direct discrimination;

(b) there are no separate provisions in the legislation;

(c) harassment includes any conduct meted out in a particular way because of the complainant's gender, race or disability. It is not confined to conduct of a purely physical nature (*Strathclyde RDC v Porcelli* (1986));

(d) a single act may amount to harassment if it is of a serious nature (*Bracebridge Engineering v Darby* (1990));

(e) racial or sexual insults may amount to harassment (*De Souza v Automobile Association* (1986));

(f) the complainant must establish that they have suffered a detriment (*De Souza v Automobile Association* (1986));

(g) the EC Resolution relating to sexual harassment at work (Resolution 6015/90) has led to a recommendation and code of practice on the protection and dignity of women and men at work. It is expected that the ET will consider the employer's application of the code of practice in any harassment cases (*Wadman v Carpenter Farrer Partnership* (1993));

(h) employers will be vicariously liable for acts of harassment committed by their employees unless they have taken all reasonable precautions to prevent such acts;

(i) in considering whether an employee is within the course of his employment when he commits an act of harassment, the courts have adopted a purposive construction of s 32 of the RRA and s 41 of the SDA so

as to deter acts of harassment in the workplace (*Tower Boot Co Ltd v Jones* (1997));

(j) an employer may also be vicariously liable where the harasser is a third party who subjects the employer's employees to acts of discrimination (*Burton v De Vere Hotels Ltd* (1996));

(k) s 4A of the Public Order Act 1986 provides for the offence of intentional harassment, involving the use of threatening, abusive or insulting words or behaviour causing another person harassment, alarm or distress;

(l) the Protection from Harassment Act 1997 creates a criminal offence and a statutory tort of harassment.

Pregnancy

With regard to pregnancy:

(a) discrimination against a pregnant woman or a woman on maternity leave may constitute direct discrimination (*Webb v EMO Cargo Ltd (No 2)* (1994); *Brown v Rentokil Initial UK Ltd* (1998));

(b) the protected period extends to the end of the maternity leave period. However, comparison with how a sick man would have been treated is legitimate outside this period (*Handels -og Kontorfunktionaerernes Forbund i Danmark (acting for Hertz) v Dansk Arbejdsgiverforening* (1991); *British Telecommunications plc v Roberts and Longstaff* (1996));

(c) protection for the pregnancy and maternity leave period applies not only to permanent contracts but also arguably to fixed term contracts (*Caruana v Manchester Airport plc* (1996));

(d) it is automatically unfair to dismiss a woman for a reason connected with her pregnancy (*Caledonia Bureau Investment and Property v Caffrey* (1998); ERA 1996)).

Indirect discrimination

Indirect discrimination is conduct which, on the face of it, does not treat people differently, ie, it is race and gender neutral. However, it is the impact of this treatment which amounts to discrimination. In order to prove discrimination the following must be established:

(a) a requirement or condition applied equally to both sexes and/or racial groups (*Price v Civil Service Commission* (1977); *Falkirk Council v Whyte* (1997));

(b) a considerably smaller proportion of the complainant's sex or race can comply with it compared to the opposite sex or persons not of that racial group (*London Underground Ltd v Edwards (No 2)* (1997); *Pearse v City of Bradford Metropolitan Council* (1988));

(c) the requirement or condition operates to the detriment of the complainant because he or she can not comply with it (*Clarke v Eley (IMI) Kynock Ltd* (1972));

(d) the requirement or condition can be justified irrespective of the gender or race of the complainant;

(e) the burden of proof is initially on the complainant; however, it moves to the employer to show justification. The test is an objective one, in which the employer must show a real need on the part of the undertaking to operate the practice, which is then balanced against the discriminatory impact of the

practice (*Hampson v Department of Science* (1989)); the EC Burden of Proof Directive will move the burden of proof onto the employer.

Victimisation

This is a separate form of discrimination (s 2 of the RRA; s 4 of the SDA):

(a) the complainant must show that he or she has been treated less favourably by reason that he or she has brought proceedings against the discriminator or another person under the RRA, SDA, EPA or DDA.

(b) it extends to the giving of evidence or information in connection with proceedings brought by another person;

(c) the complainant must show a clear connection between the action of the discriminator and his or her own conduct (*Aziz v Trinity Street Taxis Ltd* (1988)).

Segregation

Remember that:

(a) segregation is only applicable to racial discrimination;

(b) providing separate facilities for members of different races, even if they are equal in quality, is unlawful (s 1(2) of the RRA; *Pel Ltd v Modgill* (1980)).

Scope of protection

Once the complainant has established the type of discrimination, he or she must show how this relates to s 6 of the SDA, s 4 of the RRA, or s 4 of the DDA, which have the effect of making the act of discrimination unlawful.

Discrimination is unlawful if it occurs in the following situations:

(a) during the selection process, including advertising, selection for interview, the interview process;

(b) during the period of employment;

(c) the provision of opportunities during employment, eg, training, promotion or other benefits;

(d) the dismissal of employees or subjecting them to any other detriment.

Genuine occupational qualification

Both s 7 of the SDA and s 5 of the RRA permit discrimination by an employer if it falls within specified genuine occupational qualifications. These include the following:

(a) the nature of the job demands a man or woman because of their physiology, excluding strength and stamina;

(b) authenticity;

(c) decency or privacy (*Lasertop Ltd v Webster* (1997));

(d) the post requires the employee to live in where there are no separate sleeping or sanitary facilities and it is unreasonable to expect the employer to provide them;

(e) a post in a private home;

(f) the holder of the post supplies individuals or persons of a particular race with personal services promoting their welfare, education, etc (*Tottenham Green Under Fives Centre v Marshall (No 2)* (1991));

(g) a post which involves working abroad in a country whose laws and customs are such that the job can only be done by a man;

(h) the job is one of two which are held by a married couple.

Bringing a claim

A claim must be brought within three months of the date on which the act complained of was committed.

Remedies

For sex and race discrimination:

(a) unlimited compensation is available;

(b) the employment tribunal may make a declaration with respect to the rights of the complainant;

(c) the employment tribunal may make a recommendation for the employer to take specific action with respect to the act of discrimination.

Disability discrimination

The DDA 1995 mirrors the direct discrimination provisions of the SDA and RRA. There are, however, the following limitations:

(a) the DDA only applies to employers who employ 15 or more employees;

(b) the employer who is provided with a justification defence to less favourable treatment (s 5 of the DDA);

(c) 'disabled' is defined in the Disability Discrimination (Meaning of Disability) Regulations 1996—it includes physical or mental impairment which has a substantial

and long term adverse effect on his/her ability to carry out normal day to day activities.

However, the employer is under an additional duty to make adjustments to premises to ensure that the disabled person is not placed at a substantial disadvantage in comparison with persons who are not disabled (s 6 of the DDA). The employer is provided with a justification defence if he can show that the cost and nature of the adjustments as well as the practicability of making them is unreasonable.

14 Individual employment rights 2

Termination

Termination of the contract of employment may occur in a number of ways:

(a) death;

(b) mutual agreement;

(c) expiry of fixed term contract;

(d) frustration;

(e) dismissal.

Dismissal

Where an employer terminates the employee's contract, a minimum period of notice should be given. The period of notice will either be that stated in the contract of employment, or in s 86 of the ERA. The period of notice is as follows:

(a) employment between one month and two years—one week's notice;

(b) employment for more than two years—one week's notice for each year of employment, subject to a maximum of 12 weeks (s 86);

(c) either party may waive their right to notice;

(d) wages or salary may be provided in lieu of notice;

(e) an employee may be dismissed without notice for serious misconduct.

Wrongful dismissal

This is:

(a) a common law action;

(b) available to those who do not qualify under the ERA for an unfair dismissal action;

(c) available to an employee who has been dismissed unjustifiably without notice;

(d) the calculation of damages is subject to the law of contract (*Dietman v Brent LBC* (1988));

(e) other remedies, such as specific performance and injunctions, may be available (*Irani v South West Hampshire HA* (1985); *Powell v London Borough of Brent* (1987); *Anderson v Pringle of Scotland Ltd* (1998)).

Unfair dismissal

The ERA provides protection for those unfairly dismissed from their employment.

Who qualifies:

(a) all those employed under a contract of service; and

(b) those with at least one year's continuous employment (after a minimum of one year's continuous service).

The following are specifically excluded:

(a) share fishermen;

(b) any employee who has reached the normal retirement age;

(c) persons ordinarily employed outside Great Britain;

(d) workers on fixed term contracts who have waived in writing their right to claim if their contract is not renewed;

(e) police and armed forces;

(f) an approved dismissal procedure agreement between an employer and independent trade union;

(g) employees who, at the time of their dismissal, are taking industrial action or are locked out and there has been no selective dismissal or re-engagement of those taking part;

(h) where the settlement for the claim for dismissal has been agreed with the involvement of ACAS and the employee has agreed to withdraw his or her complaint.

Effective date of termination

With regard to the termination of contracts of employment:

(a) any claim must be brought within three months of the effective date of termination;

(b) the date of termination is the date on which the notice expires (*Adams v GKN Sankey* (1980));

(c) where no notice is given, the date of termination is the date on which the termination takes effect (*Robert Cort and Sons Ltd v Charman* (1981));

(d) where a contract is for a fixed term, the date of termination is the date on which the term expires.

What is meant by dismissal?

The onus is on the employee to show that he or she has been dismissed within the meaning of s 95 of the ERA. Dismissal may occur in the following ways:

(a) express termination of the contract of employment by the employer;

(b) if the words used are ambiguous, the ET will assess whether the reasonable employer or employee would have understood the words to be tantamount to dismissal (*Futty v Brekkes Ltd* (1974));

(c) termination by mutual agreement does not amount to dismissal. However, the ET will consider such cases very carefully (*Igbo v Johnson Matthey Chemicals Ltd* (1986));

(d) inviting the employee to resign may amount to dismissal (*Robertson v Securicor Transport Ltd* (1972));

(e) expiration of a fixed term contract. If a fixed term contract is not renewed and is not within the excluded category, failure to renew amounts to a dismissal.

Constructive dismissal

Constructive dismissal arises where the employee is forced to terminate the contract, with or without notice, due to the conduct of the employer:

(a) the employer's actions must amount to breach of contract to warrant the employee taking this action (*Weston Excavating Ltd v Sharp* (1978));

(b) the breach must go to the root of the contract (*British Aircraft Corpn v Austin* (1978));

(c) if the employee does not resign in the event of the breach by the employer, he will be deemed to have accepted the breach and waived any rights (*Cox Toner (International) Ltd v Krug* (1981));

(d) a series of minor incidents may have a cumulative effect, resulting in a fundamental breach (*Woods v WM Car Services (Peterborough)* (1982));

(e) a breach of an implied term may also allow the employee to claim constructive dismissal (*Gardener Ltd v Beresford* (1978); *Vaid v Brintel Helicopters Ltd* (1994)).

Written statements of the reason for dismissal

Where an employee has been dismissed within the meaning of the ERA, he is entitled to a written statement of the reasons for his dismissal subject to the following:

(a) continuous employment for one year;

(b) employee must request the statement;

(c) it must be supplied within 14 days of the request;

(d) failure to provide the statement will allow the employee to make a complaint to an ET;

(e) an award of two weeks' pay may be made if the written statement has been wrongfully withheld.

Fair dismissals

Once the employee has established that a dismissal has taken place, the onus is on the employer to show that he or she has acted reasonably in dismissing the employee, and therefore the dismissal is fair (s 98 of the ERA). The test of reasonableness is as follows: has the employer acted as a reasonable employer in all the circumstances (*Iceland Frozen Foods v Jones* (1982); *Polkey v AE Dayton Services Ltd* (1987))?

The following factors will be considered by the ET:

(a) length of service;

(b) previous disciplinary record;

(c) any other mitigating circumstances, such as use of disciplinary procedures (*Cabaj v Westminster CC* (1996)).

The employer must act reasonably and, therefore, must consider any possible alternatives if the dismissal is to be regarded as fair.

The following grounds may amount to a fair dismissal (s 98 of the ERA):

(a) Capability or qualifications

When considering the employees' capabilities or qualifications, the following must be taken into account:

- 'capability' means skill, aptitude, health or any other physical or mental quality;
- 'qualification' means any degree, diploma or other academic, technical or professional qualification relevant to the position which the employee held (*Blackman v Post Office* (1974));
- the employer should attempt to improve poor performance before dismissing an employee (*Davison v Kent Motors Ltd* (1975));
- appropriate warning should be provided unless the act of incompetence is so serious that warnings are inappropriate (*Taylor v Alidair* (1978));
- long term sickness should be properly investigated before a dismissal takes place (*London Fire and Civil Defence Authority v Betty* (1994)).

(b) Conduct

Whether dismissal for misconduct is fair will depend on:

- the nature of the defence and the appropriate use of the disciplinary procedure (*Hamilton v Argyll and Clyde Health Board* (1993)). Reasonable investigation should be carried out by the employer into the conduct (*Robinson v Crompton Parkinson Ltd* (1978));
- the employer must act as a reasonable employer (*Taylor v Parsons Peebles Ltd* (1981));
- where it is impossible to ascertain which employee is guilty where a number are implicated, it may be reasonable to dismiss all the employees concerned (*Parr v Whitbread plc* (1990); *Whitbread and Co v Thomas* (1988)).

(c) Redundancy

Redundancy may amount to a fair dismissal subject to the following:

- sufficient warning;
- consultation with the trade union;
- adoption of objective rather than subjective criteria for selection;
- selection in accordance with the criteria;
- redeployment rather than dismissal where possible (*Williams v Compair Maxam Ltd* (1982));
- where selection for redundancy was because the employee was a member or non-member of a trade union or participated in trade union activities, this will automatically be unfair dismissal (s 153 of the Trade Union and Labour Relations (Consolidation) Act 1992 (TULRCA)).

(d) Statutory restrictions

Where the continued employment of the employee would result in a contravention of a statute or subordinate legislation, the dismissal will be *prima facie* fair (*Fearn v Tayford Motor Co Ltd* (1975)).

(e) Some other substantial reason

There is no exhaustive list of what amounts to other substantial reason. The following are examples:

- conflict of personalities, primarily the fault of the employee (*Tregeanowan v Robert Knee and Co* 1975));
- failure to disclose material facts in obtaining employment (*O'Brien v Prudential Assurance Co Ltd* (1979));
- failure to accept changes in the terms of employment (*Storey v Allied Brewery* (1977));
- a dismissal which satisfies reg 8(2) of the Transfer of Undertakings (Protection of Employment) Regulations 1981 in so far as the dismissal is for an 'economic, technical or organisational reason entailing changes in the workforce and the employer is able to show that his actions were reasonable'.

Situations where the dismissal is automatically unfair

Dismissal on the following grounds is automatically unfair:

(a) trade union membership or activities (s 152 of the TULRCA);

(b) pregnancy or childbirth (s 99 of the ERA): a dismissal is automatically unfair if the principal reason for it is pregnancy or a reason connected with pregnancy, or following the maternity leave period, dismissal for

childbirth or a reason connected with childbirth (*O'Neill v Governors of Saint Thomas More RCVA School* (1996));

(c) industrial action: dismissal of those participating in a strike, lock out or other industrial action, may be unfair if only some of the participants are dismissed or are not offered re-engagement within a three month period (s 238 of the TULRCA);

(d) industrial pressure: where an employer dismisses an employee because of industrial pressure from other employees, the dismissal may be unfair (s 107 of the ERA);

(e) s 100 of the ERA provides that an employee has the right not to be dismissed for carrying out health and safety activities, drawing health and safety matters to the attention of the employer, or taking appropriate steps to protect him or herself or other persons from danger, including leaving the workplace or refusing to return to the workplace (*Harries v Select Timber Frame Ltd* (1994); *Lopez v Maison Bouquillon Ltd* (1996)).

Remedies

Remedies include:

(a) reinstatement;

(b) re-engagement;

(c) compensation:

- basic award, calculated on the basis of age and continuous service;
- compensatory award—discretionary;

- additional award—for failing to comply with an order for reinstatement or re-engagement;
- special award—where dismissal relates to trade union membership;
- interim relief.

Redundancy

Where an employee's services are no longer required by the business, the employee may be entitled to redundancy payments. The employee must show:

(a) continuous employment for a period of two years;

(b) employment under a contract of service;

(c) that the excluded categories do not apply (see above);

(d) dismissal and the reason for dismissal was redundancy.

Redundancy defined (s 139 of the ERA)

The following amount to redundancy situations:

(a) cessation of the employer's business;

(b) closure or change in the place of work. Moving to new premises in the same town may not amount to redundancy (*Managers (Holburn) Ltd v Hohne* (1997)); nor will the existence of an express mobility clause (*UK Automatic Energy Authority v Claydon* (1974));

(c) diminishing requirements for employees;

(d) lay-off and short time.

A claim for redundancy payment may be made in circumstances where the employee has been laid off or been kept on short time for either four or more consecutive weeks or for a series of six or more weeks within a period of 13 weeks. The employee must give written notice to his employer of his intention to claim redundancy payments no later than four weeks from the end of the period, and should terminate the employment by giving at least one week's notice, or the period stipulated in the contract of employment. The employer may serve a counter-notice, within seven days of the employee's notice, contesting the claim (ss 147–49 of the ERA).

Change in ownership and transfer of undertaking

Continuity is preserved in the following situations:

(a) change of partners;

(b) where trustees or personal representatives take over the running of the company when the employer dies;

(c) transfer of employment to an associated employer;

(d) transfer of an undertaking, trade or business from one person to another (s 218(2) of the ERA; s 33 of the Trade Union Reform and Employment Rights Act 1993).

All existing rights are transferred and become enforceable against the new business. If, following a transfer of undertaking, an employee is dismissed for an economic, technical or organisational reason, redundancy payment may be claimed (*Litster and Others v Forth Dry Dock and Engineering Co Ltd* (1989)).

Offer of alternative employment

Where the employer makes an offer of suitable alternative employment, which is unreasonably refused by the employee, the employee will be unable to claim redundancy.

Whether the alternative employment is suitable will be a question of fact in each case, by reference to the old contracts, including the place of work, nature of the work, pay and conditions, etc.

Whether a refusal by the employee is reasonable will depend, *inter alia*, on the personal circumstances of the employee (*Cambridge and District Co-Operative Society Ltd v Ruse* (1993)).

Where the employee accepts the offer of alternative employment, he is entitled to a minimum trial period of four weeks if the contract is renewed on different terms and conditions (s 132 of the ERA).

Once notice of redundancy has been received, an employee is entitled to a reasonable amount of time off to seek work or retrain (s 52 of the ERA).

Compensation

Unfair dismissal is based on the length of service multiplied by the weekly wage.

Procedure for handling redundancies

Where redundancy is to take place, the employer must consult a recognised trade union or elected employee representative in good time. The employer must disclose the following:

(a) the reason for the proposed redundancies;

(b) the number and description of the employees whom it is proposed to make redundant;

(c) the total number of employees of that description employed at that establishment;

(d) the method of selection;

(e) the method of carrying out the redundancy, having regard to any procedure agreed with the trade union.

The minimum consultation periods are as follows:

(a) at least 90 days before the first dismissal takes effect, where the employer proposes to make 100 or more employees redundant at one establishment within a period of 90 days or less;

(b) at least 30 days before the first redundancy takes effect where he or she proposes to make 20 or more employees redundant at one establishment within a 30 day period;

Failure to comply with the consultation procedure may result in a protective award being made to those employees who were affected.

The Secretary of State should also be informed.

15 Consumer credit

Consumer Credit Act 1974

The Consumer Credit Act 1974 (CCA) applies to regulated consumer credit agreements. The key elements of such an agreement are:

(a) a creditor: the person or body supplying the credit or finance;

(b) the debtor: an individual who borrows money supplied by the creditor;

(c) credit: a loan not exceeding £15,000 (s 8);

(d) credit: token agreements may also be regulated agreements. This includes credit cards, but excludes cheque guarantee cards (s 14).

Regulated agreements may also fall within the following categories:

(a) restricted use credit agreement: where the debtor has no control over the use to which the credit is put;

(b) unrestricted use credit agreement: where the debtor has control over the use of the finance;

(c) debtor-creditor-supplier agreement: where there is a connection between the creditor and the supplier;

(d) debtor-creditor agreement: where the supplier has no connection with the person providing the credit.

Credit may be:

(a) fixed sum credit: where the total amount of the loan is fixed from the start of the agreement;

(b) running account credit: where credit is fixed up to an agreed limit, eg, bank overdrafts;

(c) small agreements: where the amount of credit does not exceed £50.

Licensing

Businesses which provide facilities for regulated agreements must be licensed by the Office of Fair Trading. This includes:

(a) businesses whose main activity is the supply of credit;

(b) businesses where the provision of credit is ancillary;

(c) unlicensed traders will be unable to enforce any credit agreement;

(d) trading without a licence is an offence under s 39;

(e) standard licence issued to an individual is valid for five years;

(f) a group licence issued to an identifiable group is valid for 15 years.

Advertising and canvassing

Note that:

(a) advertising and canvassing is controlled by the Consumer Credit (Advertisement) Regulations 1989;

(b) the regulations provide for control over the form and content of the advertisements for credit;

(c) failure to comply with the Regulations is a criminal offence;

(d) any advertisements should contain a fair and reasonably comprehensive indication of the nature of the credit facilities offered and their true cost;

(e) canvassing off trade premises is also regulated.

Form of the regulated agreements

Consumer Credit (Agreement) Regulations 1983

If the rules affecting the form of regulated agreements are not followed, the creditor or owner will be prevented from enforcing the agreements:

(a) the terms of the agreement must be in writing and must be legible;

(b) the cash price of the goods must be stated in the agreement;

(c) it must provide for payment of equal instalments at equal intervals and must include reference to the method of payments;

(d) it must include a description of the goods sufficient to identify them;

(e) the agreement must contain certain statutory notices, eg, right to terminate or cancel the agreement;

(f) it must be typewritten; there must be space for a signature in a box outlined in red.

Copies of the agreement

If the creditor or finance company signs at the same time as the hirer or debtor, then the hirer or debtor must receive a copy immediately.

If there is a time lag, then the dealer/supplier must send the

forms off to the finance company for agreement and then the hirer or debtor must receive:

- a copy of his offer immediately;
- a subsequent copy of the concluded agreement within seven days.

This allows time for the debtor to be informed of his right and to withdraw from or cancel the agreement (*National Guardian Mortgage Corp v Wilkes* (1993)).

Cancellation

Note that:

(a) an agreement signed off trade premises is cancellable;
(b) the right of cancellation and the procedure to be carried out must be included in the agreement;
(c) the 'cooling off' period is five days from the signing of the agreement until after the second copy is received;
(d) goods must be returned and payments made can be recovered.

Default

Where a debtor fails to meet the repayments, the goods can normally be repossessed.

Where the goods are deemed to be protected goods, ie, the debtor has paid one-third or more of the price, the owner of the goods can only enforce his right to repossess the goods by court action.

Repossession without a court order will result in termination of the agreement and the debtor will be able to claim back any money he has paid under the agreement.

Where a court order is obtained, the court may order the return of the goods to the owner or may order a variation of the terms of the original agreement, or may order part of the goods to be transferred to the debtor.

Before any action for repossession can be pursued, the owner or creditor must serve a default notice on the hirer or debtor giving the hirer or debtor seven days' notice to pay or remedy the default.

Following receipt of a default notice, the debtor or hirer may apply for a time order from the court which allows him extra time to make payments or rectify the breach (*Southern District Finance v Barnes* (1995)).

Termination of regulated agreements

Where there is a regulated hire purchase or conditional sale agreement, the debtor can terminate at any time, provided notice is given to the finance company or its agent. The debtor or hirer may be required to pay up to 50% of the price of the goods as well as all sums due.

Extortionate credit bargains

If a credit agreement is deemed to be extortionate by the court, the court may reopen the agreement and either set it aside or rewrite the terms (*Ketley Ltd v Scott* (1981)).

Credit reference agencies

A person who has been refused credit may request the name and address of the credit reference agency from the creditor.

On receipt of a written request, the agency must supply a copy of the customer's file which the customer can then apply to have amended.

16 Sale of goods

Sources

(a) Sale of Goods Act 1979 (SGA);
(b) Sale and Supply of Goods Act 1994;
(c) Sale of Goods (Amendment) Acts 1994 and 1995;
(d) Supply of Goods and Services Act 1982.

The definition of a contract for the sale of goods

This is defined as 'contract by which the seller transfers or agrees to transfer the property in goods to the buyer for money consideration called the price' (s 2(1) of the SGA):

(a) consideration must be in monetary form;
(b) the price is to be fixed by the contract or determined by the course of dealings between the parties;
(c) 'goods include personal property of a movable type' land and buildings are specifically excluded;
(d) any agreement can be made orally or in writing.

Transfer of property in the goods

Whether property in the goods can be transferred will depend on the nature of the goods. Goods can be divided into distinct categories:

(a) specific goods are goods identified and agreed upon at the time the contract is made;
(b) ascertained goods are those identified and agreed upon after the making of the contract: eg, 20 sacks of flour which are set aside for the buyer;

(c) unascertained goods are those which have not been specified;

(d) future goods are goods to be manufactured, to be acquired by the seller after the contract has been made.

The principal rules relating to the transfer of property are as follows:

(a) where there is a contract for the sale of unascertained goods, no property in the goods is transferred to the buyer until the goods are ascertained (s 16 of the SGA; see also s 20A);

(b) property passes when the parties intend to pass (s 17), subject to the general rules found in s 18: if there is a contract for specific goods, property passes to the buyer when the contract is made (s 18, r 1). The intention of the parties may overrule this (*Re Anchorline (Henderson Bros Ltd)* (1937)). For property to pass, goods must be in a deliverable state (*Dennant v Skinner and Collam* (1948));

(c) if there is a contract for the sale of specific goods, but the seller is bound to do something to put them in a deliverable state, then ownership does not pass until that thing is done and the buyer has noticed that it is done (s 18, r 2; *Underwook v Burgh Castle Brick and Cement Syndicate* (1922));

(d) if the goods are to be weighed, tested or measured or subjected to some other act for the purpose of ascertaining the price, the property does not pass until the process is complete and the buyer informed (s 18, r 3);

(e) where goods are supplied on sale or return or on approval, property passes to the buyer when the buyer signifies approval or acceptance, or the buyer does any other act adopting the transaction, or the buyer retains the goods beyond the agreed time, or if no time is agreed, beyond reasonable time (s 18, r 4; *Poole v Smiths Car Sales (Balham) Ltd* (1962); *Atari Corpn Ltd v Electronics Boutique* (1998));

(f) where there is a contract for the sale of unascertained or future goods by description, and goods of that description and in a deliverable state are unconditionally appropriated to the contract, either by the seller with the assent of the buyer or by the buyer with the assent of the seller, property in the goods passes to the buyer (s 18, r 5; *Carlos Federspiel and Co v Charles Twig and Co Ltd* (1957)). Goods placed with a carrier for transmission to the buyer are deemed to be unconditionally appropriated to the contract (s 18, r 5(2)). Ascertainment by exhaustion takes place where goods are part of a designated bulk and the bulk is reduced to a quantity equal to the contract quantity (*MacDougal v Eire Marine of Emsworth Ltd* (1958));

(g) where the buyer purchases a specified quantity of goods from an identified bulk source and has paid for some or all of the goods, the buyer becomes co-owner of the bulk.

Destruction of the goods

The rules relating to the transfer of property in the goods assist in determining who is liable should the goods be destroyed or perish:

(a) if goods perish due to delayed delivery through the fault of either the buyer or the seller, then the loss falls on the party at fault (*Demby Hamilton Co v Barden Ltd* (1949));

(b) if the goods have perished before the contract is made, the contract is void (s 6; *Couturier v Hastie* (1956)).

If property, and therefore risk, has not been passed to the buyer when the goods perish, the contract can be avoided. However, if risk has passed, the buyer must bear the loss (*Ashfar v Blundell* (1896)).

A seller may use a reservation of title clause to protect his interests, particularly where the buyer fails to pay for the goods. However, such clauses may impact on the transfer of property and therefore risk (*Aluminium Industrie Vaasen v Romalpa Aluminium Ltd* (1976)).

Sale by a person who is not the owner

All contracts for the sale of goods contain an implied term that the seller has the right to sell the goods, ie, that he or she can pass on a good title to them (s 12). Such contracts are also subject to the rule *nemo dat quod non habet*, which means that a person cannot give what he or she has not got. This means that the rightful owner of the goods is protected. As a general rule, where goods are sold by a person who is not the owner, the buyer requires no better title than the seller (s 21). There are, however, exceptions to that rule:

(a) estoppel: where the seller or buyer by their conduct make the other party believe that they have ownership in the goods and the other party alters his position, then that same party will later be estopped from saying that the fact is untrue (*Eastern Distributors v Goldring* (1957));

(b) agency: if a principal appoints an agent to sell his goods to a third party, then any sale by the agent in accordance with the instructions given, will pass on a good title to a third party (*Central Newbury Car Auctions v Unity Finance* (1957));

(c) mercantile agent: where the agent is a mercantile agent, ie, one who has in the customary course of business as such an agent, authority either to sell goods or to consign goods for the purpose of sale or to buy goods or to raise money on the security of goods, a third party will obtain a good title from such an agent (*Folkes v King* (1923); *Pearson v Rose and Young* (1951));

(d) sales authorised by law: where the sale is authorised by the courts a good title is passed to the buyer;

(e) sale under a voidable title: if, at the time of the sale, the seller's title has not been avoided, the buyer can acquire a good title to the goods, provided that he did not know of the seller's defective title and bought the goods in good faith (s 23; *Car and Universal Finance Co v Caldwell* (1965));

(f) disposition by a seller in possession: if the seller sells goods to a second buyer, having retained possession of the goods, the second buyer will obtain a good title if he takes the goods in good faith and without notice of the original sale. The first buyer must then sue the seller for breach of contract (*Pacific Motor Auctions v Motor Credit (Hire Finance) Ltd* (1965));

(g) disposition by a buyer in possession: where the buyer has possession of the goods with the consent of the seller and transfers these to an innocent second buyer, that buyer will obtain a good title to the goods as long

as he takes the goods in good faith and without notice of any claim on the goods by the original seller (s 25(1); *Cahn v Pockets Bristol Channel Co* (1899));

(h) however, if there is a reservation of title clause, the sub-purchaser may not be able to rely on s 25 (*Re Highway Foods International Ltd* (1995));

(i) sale of a motor vehicle subject to a hire purchase agreement—where a motor vehicle is subject to a hire purchase agreement, a private purchaser may obtain a good title to the vehicle as long as he takes in good faith and without notice of the hire purchase agreement.

Implied terms

A number of terms are implied into every contract for the sale of goods. There are three types of term:

(a) *condition:* this is a fundamental term of the contract, any breach of which will allow the injured party to treat the contract as repudiated;

(b) *warranty:* this is a lesser term of the contract, a breach of which will allow the buyer to claim damages, but not to reject the goods;

(c) *innominate term:* this is neither a condition nor a warranty, however, a breach may result in repudiation of the contract if it is deemed to go to the root of the contract.

Title (s 12)

There is an implied condition that the seller has the right to sell the goods and the ability to transfer a good title to the buyer (*Niblett Ltd v Confectioners Materials Co* (1921)).

There is an implied warranty that the goods are free from any charge or encumbrance not disclosed or known to the buyer before the contract is made, and that the buyer will have quiet possession of the goods (s 12(2); *Microbeads AC v Vinhurst Road Markings* (1975)).

Description (s 13)

Where goods are sold by description, goods must accord with the description applied to them. A sale by description occurs where the buyer does not see the goods, but relies on a description of them, or where the buyer sees the goods, but relies on terms describing features of the goods or selfdescription (*Harlingdon and Leinster Enterprises v Christopher Hull Fine Art Ltd* (1990); *Beale v Taylor* (1967)).

Satisfactory quality (s 14(2))

Goods sold in the course of a business must be of satisfactory quality unless defects are specifically drawn to the buyer's attention before the contract is made, or where the buyer examines the goods before the contract is made, any defects which that examination ought to reveal, or in the case of contract for sale by sample, any defect which would have been apparent on reasonable examination of the sample. There is, however, no obligation on the buyer to carry out an examination. Satisfactory quality is defined as 'a standard that a reasonable person would regard as satisfactory, taking account of any description of the goods, the price if relevant and all the other relevant circumstances' (s 14(2A)). However, the quality of the goods includes their state and condition and the following (among others) are, in appropriate cases, aspects of the quality of the goods:

(a) fitness for all the purposes for which goods of the kind in question are commonly supplied;

(b) appearance and finish;

(c) freedom from minor defects;

(d) safety;

(e) durability (s 14(2B)).

This is a non-exhaustive list, and failure to comply with one of the factors will not necessarily result in goods being classified as unsatisfactory quality (*Rogers v Parish (Scarborough) Ltd* (1987); *Bernstein v Pamson Motors (Golders Green) Ltd* (1987)).

Reasonable fitness for the purpose

There is an implied condition that the goods supplied are reasonably fit for any purpose expressly or impliedly made known to the seller under s 14(3). If the purpose or use is unusual, or the goods have several normal but distinct uses, then the purpose must be made known expressly (*Ashington Piggeries v Hill* (1972); *Griffiths v Peter Conway Ltd* (1939)).

Sale by sample (s 15)

There is an implied condition that where goods are sold by sample, they will comply with that sample. They should also be free from any defect making their quality unsatisfactory, which would not be apparent on reasonable examination of the sample (*E and S Rubin v Faire Bros and Co Ltd* (1949)).

Exclusion clauses

Certain implied terms cannot be excluded:

(a) s 12 of the SGA cannot be excluded;

(b) ss 13–15 of the SGA cannot be excluded in a consumer sale;

(c) ss 13–15 can only be excluded in a non-consumer sale where the test of reasonableness is satisfied.

Any other liability for breach of contract can be excluded or restricted only to the extent that it is reasonable.

Exclusion of liability for death and personal injury is prohibited (s 2(1) of the UCTA).

Unfair terms in standard form contracts may be challenged as being contrary to good faith (Unfair Terms in Consumer Contracts Regulations 1994).

Delivery and acceptance of the goods

It is the duty of the seller to deliver the goods and the duty of the buyer to accept them and pay for them (s 27). Payment and delivery are concurrent conditions, unless otherwise agreed (s 28):

(a) delivery by instalments is not acceptable unless the contract specifically states that delivery is going to take place by this method (s 31);

(b) the buyer may reject or accept the goods where delivery is late;

(c) the buyer has a right of partial rejection (s 35A).

Acceptance occurs where:

(a) the buyer states to the seller that the goods are acceptable;

(b) the goods have been delivered to the buyer and he does an act in relation to them which is inconsistent with the ownership of the seller;

(c) the buyer is not deemed to have accepted the goods until he has had a reasonable opportunity of examining them for the purpose of ascertaining whether they are in conformity with the contract, and in the case of a contract for sale by sample, of comparing the bulk with the sample;

(d) acceptance is also deemed to have taken place where the buyer retains the goods after a reasonable length of time without intimating to the seller that they will be rejected (*Bernstein v Pamson Motors (Golders Green) Ltd* (1980)).

Price

The price may be fixed or determined by an agreed procedure. The buyer must, however, pay a reasonable price which will be a question of fact depending on the circumstances of the case (*Foley v Classique Coaches Ltd* (1934)).

Remedies for breach of contract

Seller's remedies

The seller may bring an action for the price of the goods where:

(a) the buyer has wrongfully refused or neglected to pay for the goods according to the terms of the contract; or

(b) the property is passed to the buyer or the price is payable on a certain day, irrespective of delivery.

Damages for non-acceptance of the goods

The seller may pursue a claim for damages for nonacceptance of the goods.

Lien

The seller has a right to retain possession of the goods, even though property is passed to the buyer where the seller remains unpaid.

Stoppage in transit

If the buyer becomes insolvent and the goods are still in transit between the seller and buyer, the unpaid seller is given the right to stop and recover the goods from the carrier.

Reservation of title clause

The insertion of such a clause in the contract allows the seller to retain some proprietary interest over the goods until payment is made by the buyer.

Right of resale

An unpaid seller can pass a good title to the goods to the second buyer after exercising a right of lien or stoppage and transit.