THE NIGERIAN LAW OF

CONTRACT

WITH PRACTICAL EXAMPLES.

CONTENT:
- WHAT IS A CONTRACT?
- WHAT IS AN OFFER
- ACCEPTANCE
- CONSIDERATION
- INTENTION TO CREATE LEGAL RELATIONS
- CAPACITY TO CONTRACT

Facilitated By:

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PREFACE

A hearty congratulation to you!!! Welcome to the second year of your legal journey! From the depths of my heart, I felicitate with you as you climb the ladder to proceed unto the next phase of your legal studies.

Rumour has it that Law of contract is the most difficult course of your second year, and you probably already have it at the back of your mind that what you heard is true. Well, I'm here to refute what you heard.

If you ask me, Contract law is the simplest of all law courses... But you must know that the course, although simple, is tactically voluminous. But that's not to scare you, it's just to prepare you for what lies ahead.

Having realised that, a meticulously compiled note becomes imperative, to aid your knowledge and facilitate a comprehensive understanding of the subject matter. Furthermore, this note well covers the reality of what you will do in the class room and some additives to better your knowledge. We have organized a jolly ride contractual trip, a companion that would help simplify law of contract and help you sail smoothly in your second year. The goal is to have an A, together we can do that, right?

Once again, I congratulate you and I pray your ship docks in grand style. I wish you a great semester ahead.

If you made the 'A' promise earlier. Let's get down to business by opening to the next page.

Abass Olayinka A,

(Llb4).

TAKE NOTE:

➢ the cases are in bold **ITALICS**
➢ the judgements of the courts are in [DOUBLE BRACKETS].

I wish you a great semester ahead. Cheers.
INTRODUCTION

FORMATION OF A CONTRACT

In simple terms, a contract is an agreement between two parties. For there to be a valid contract between them, such a contract must have the basic elements of a contract. These include:

Offer,

Acceptance,

Consideration,

Intention to Create Legal Relationship

Capacity to Contract.

WHAT IS A CONTRACT?

A contract is described as “an agreement which the law will enforce or recognise as affecting the legal right and duties of the parties. It may also be seen as a promise or set of promises which the law will enforce”. It should be noted that it is not all promises or agreement that the law will or can enforce. E.g., social and domestic agreements are generally not binding at law. Thus, you may not be able to enforce it at
law. The reason is simply because *there is no intention to create legal relations.* i.e., you don’t want the court to look into the matter (issue) so as to determine liability. However, where a *(promise/agreement)* is supported by CONSIDERATION, the court will look into it. In *Orient Bank (Nig) plc v Bilante Intl Ltd*, Tobi J.C.A defines contract as “an agreement between two or more parties which creates reciprocal legal obligations to do or not to do particular things. For a contract to be valid, there must be mutuality of purpose and intention.” It should be noted that a contract can only exist between two parties and not more than two people. Where such exists, it means that the extra people involved, belong to a side (a party) and the same applies to the other or there is more than a contract involved, i.e, a **contract of guarantee** usually involving 3 parties and two contracts. E.g., 1, contact of guarantee between the lender and the guarantor. 2 the loan contract between the lender and the debtor whose debt is being guaranteed.

CLASSIFICATION OF CONTRACTS:

There are basically two types pf contracts at common law. I.e:

a. Formal contracts *(a contract made by deed or under seal)*

b. Simple contracts *(parole)*

**Contract Under Seal /Deed** (formal contract):

This is a kind of contract that must be in writing that may be typed on paper or parchment. This kind is an **executed** contract which is given full legal effect by being signed, sealed and delivered by the executing party to the other.

**NB.** Since the second half of the 19th century, *signing / signature* was regarded as not necessary for the execution of the deed. Execution was valid provided the seal of the seal of the executing party was imprinted on the deed. However, by the English Law Property Act 1925 s 73 and other Nigerian laws, a person executing a deed must either sign or make his mark in addition to the sealing if the deed is to be valid. This stiff procedure became so because seals are now massed produced as against how it used to
be by the executing party, using wax on his crest or coat of arms. Thus, without the signature a deed will not be valid since it’s now merely symbolic.

**Simple contract:**
These are contracts other than formal contracts. It’s may be written, oral partly written or oral. It is a contract not under seal. It may alternatively be called a *parole contract.* Simple contracts are equally enforceable. this is in a case where consideration has been furnished. The distinction between a formal and simple contract is that the latter is not compulsorily written or under a deed.

By and large, a contract of deed such as: *interest in land, commercial transactions* must be in writing.

**Unilateral and bilateral contracts:**

In order to understand the law on offer and acceptance, you need to understand the concepts of unilateral and bilateral contracts. Most contracts are bilateral. This means that each party takes on an obligation, usually by promising the other something – for example, if Mr. A promises to sell something, and Mr. G wants to buy it. (Although contracts where there are mutual obligations are always called bilateral, there may in fact be more than two parties to such a contract.) By contrast, a unilateral contract arises where only one party assumes an obligation under the contract. Examples might be promising to give your sister #3000 if she gives up drinking for a year, or to pay a #5000 reward to anyone who finds your lost purse, or, as the court suggested in *Great Northern Railway Co v Witham,* to pay someone £100 to walk from London to New York. What makes these situations a unilateral contract is that only one party has assumed an obligation. you are obliged to pay your sister if she gives up drinking, but she has not promised in turn to give up drinking. Similarly, you are obliged to pay a reward to anyone who finds your purse, but nobody need actually have undertaken to do so. A common example of a unilateral contract is what usually happens between estate agents and people trying to sell their houses – the seller promises to pay a specified percentage of the house price to the estate agent if the house is sold, but the estate agent is not required to promise in return to sell the house, or even to try to do so.
An offer may be defined as: *a definite undertaking or promise made by two parties with the intention that it shall become binding upon them should they accept the terms of the contract.* In this case, it shall become binding on the party to whom it is addressed and will be liable upon its breach. Thus, an offer must be:

- Certain (un ambiguous)
- Definite.

**NB.** The person making the contract is known as the **OFFEROR.** The person to whom the contract is addressed or who accepts is known as the **OFFEREES.** Having said this, an offer may equally be made to the public.

**OFFER TO THE PUBLIC:**

Very often, an offer will be made to a specified person – as when C offers to sell his computer to B. However, offers can be addressed to a group of people, or even to the general public. In this kind of situation, the offeree does not need to communicate their acceptance. Acceptance will be complete upon action taken. So if Miss O declares that she is looking for her lost ‘puppy’; and that anyone who finds it will be rewarded with two packs of coke solo. If Miss I finds it, she only need to show her proof and get the reward. Failure to give her will lead to a breach of contract. Thus in: 

**Carlill v Carbolic Smoke Ball Co,** the defendants were the manufacturers of ‘smokeballs’ which they claimed could prevent flu. They published advertisements stating that if anyone used their smokeballs for a specified time and still caught flu, they would pay that person £100, and that to prove they were serious about the claim, they had deposited £1,000 with their bankers. Mrs Carlill bought and used a smokeball, but nevertheless ended up with flu. She therefore claimed the £100, which the company refused to pay. They argued that their advertisement could not give rise to a contract, since it was impossible to make a contract with the whole world, and that therefore they were not legally bound to pay the money. [ This argument was rejected by the court, which held that the advertisement did constitute an offer to the world at large, which
became a contract when it was accepted by Mrs Carlill using the smokeball and getting flu. She was therefore entitled to the £100).

It should be noted that an offer may also be made either expressly or impliedly. Where it is express, the terms of the contract are expressly stated and no problems arise from this. However, where it is implied, the court will have to look at the surrounding circumstances to deduce the terms of the contract. The test for this however is the OFICIOUS BY STANDER TEST or OBJECTIVE TEST. (a reasonable man’s test). i.e., what an ordinary man can infer from the contract (agreement) between the parties. Thus, in:

_Brodgen v Metropolitan Railway Company_, where the plaintiffs made an offer to the defendant requesting the latter to sign and returning a form; containing the terms of the offer. The defendant did not sign nor return the form but nevertheless carried out the contract on those terms. [It was held by the court that the two parties are bound by the contract because of their conduct].

**INVITATION TO TREAT**

This is a stage in an ongoing transaction where parties come together to discuss the likelihood of them having a contract. There are no express terms yet. It is merely a preliminary stage which leads to a contract. In this case, it wouldn’t help the offeror to feel that “we should have a contract”. You shouldn’t have to feel that way until express terms are clearly stated.

What should be noted in the case of an invitation to treat is that it could lead to a contract. However, acceptance on the part of the offeror does not make it binding. The offeree, may choose to withdraw whatever he has represented to sell or do. Thus, in _Olaopa v OAU_, the university had some landed property at Ibadan which it wanted to put to commercial use in the form of hotels, flats etc…they invited the appellant who was the architect. At the meeting, the survey plan was discussed but no specific instruction was given to the appellant to commence work. Later, he sent a bill of #159,875.00 for the work done. The university didn’t pay and the appellant sued to recover fees. Confirming the decision of the lower court, [the supreme court held that the university didn’t make an express offer which the appellant could accept].
There are several kinds of invitation to treat. They include:

- **Auctions** (advertisement),
- **Display of Goods.**
- **Invitation to Tender,**
- **Buses, taxes, lories, etc…**

**Auctions:**
The auctioneers request for a bid has been recognised as an invitation to treat or an attempt to set the ball rolling as far as 1789. It is this “bid” that constitutes the offer. However, the auctioneer is under no obligation to accept this offer. Here it is the bidders that makes the offer while the auctioneer is the one who must either accept or reject. Thus, acceptance will be complete when the auctioneer’s hammer falls.

**NB,** an auctioneer is not liable to anyone who comes to bid for the sale of an item; should there be a cancellation. In *Harris v Nickerson,* the defendant who was an auctioneer, advertised he would sell office furniture on a specific date. The plaintiffs attended the auction with an intention to buy some office furniture. The defendants withdrew the furniture from sale. The plaintiffs sued for breach of contract, contending that the advertisement was an offer. The court held that: the advert didn’t amount to a statement of intention amounting to an invitation to treat. The implication of auctions is that is captioned in the Yoruba saying *if I say my father’s masquerade will dance tomorrow at the market square; if it doesn’t what will the father of anyone do?*

**Display of Goods:**
Basically, goods that have been tagged a price on a shelf or even inside the shelve do not constitute and express offer. It is merely an invitation to treat rather than an offer to sell the goods. In *Fisher v Bell* the defendant had displayed flick knives in his shop window, and was convicted of the criminal offence of offering such knives for sale. On appeal, *Lord Parker CJ* stated that the display of an article with a price on it in a shop window was only an invitation to treat and not an offer, and the conviction was overturned. Where goods are sold on a self-service basis, the customer makes an offer to buy when presenting the goods at the cash desk, and the shopkeeper may accept or
reject that offer. [It was the decision of the court in this case that the display did not constitute an offer].

Similarly, In *Pharmaceutical Society of Great Britain v Boots Cash Chemists (Southern) Ltd*, Boots were charged with an offence concerning the sale of certain medicines which could only be sold by or under the supervision of a qualified pharmacist. Two customers in a self-service shop selected the medicines, which were price-marked, from the open shelves, and placed them in the shop’s wire baskets. The shelves were not supervised by a pharmacist, but a pharmacist had been instructed to supervise the transaction at the cash desk. The issue was therefore whether the sale had taken place at the shelves or at the cash desk. [The Court of Appeal decided the shelf display was like an advertisement for a bilateral contract, and was therefore merely an invitation to treat. The offer was made by the customer when medicines were placed in the basket and presented at the cash desk, and was only accepted by the shop at the cash desk. Since a pharmacist was supervising at that point no offence had been] *committed*.

- **Invitation to Tender**
  
  This is basically a ‘bid situation’. In this situation, the offeree, makes an offer to the advertiser of a property. **NB**, in the case of a tender, there may be more than one bidder. They may be up to 5 or as many people are available. Thus, the property goes to the highest bidder. for example: *Toye* wishes to sell his plasma TV the then makes an advertisement on ORISUN FM to all interested person. Thus, upon being notified of Toye’s intent, *Demola, precious, Lillian, mirria & Gloria* all applied to get the TV. Here, the property will usually pass to the highest bidder. **NB**, rejection of a tender offer has no legal effect or implication because the law sees it as a mere invitation to treat.

- **Bus, taxes lorries, etc…**
  
  The bus and taxes scenario is a daily occurrence in the lives of every individual. Almost everyone uses the services provided by bus drivers or taxi drivers. Thus, if a *Taungboro* bus driver at SUB calls the usual chant “TAUN-GBORO-TAUN” it is an offer made to the entire world at that point. Acceptance is only complete when you hop in. thus, that means that you basically understand everything he has said. He simply means
he is going to town and no other place. On the other hand, where you are walking along the streets of ASHERIA ESTATE and you are almost at cedar junction where the motorcyclists converge. The moment you call out to one of them only to mention “CAMPUS GATE” you have made offer to him. His duty at that point is to accept or decline. **NB**, if any party declines, there will be no legal implication. This is because such is only an invitation to treat.
This may be regarded as “the final and unequivocal expression of assent to an offer flowing from the offeree.” In order to have a valid acceptance, the offeree must accept the offer and the terms in it the way they are. Furthermore, acceptance may either be expressly or by conduct. It is a general rule that an offeree must not qualify the agreement otherwise it will be a counter offer or in the worse scenario, an invalid acceptance. E.g., if Y contracts B to supply 500 bags of coco yam at a date. If upon delivery, B delivers only 250 bags, that would have been a variation of terms of agreement and it would be a fundamental breach.

Furthermore, a party cannot accept in silence or mentally. Acceptance must validly be communicated. It must be evidenced in any manner consistent with the terms of the agreement. This could be orally or in written. In most cases, in writing. This is so because, the court needs an evidence which they can infer acceptance from. Thus, in Felthouse v Bindley an uncle and his nephew had talked about the possible sale of the nephew’s horse to the uncle, but there had been some confusion about the price. The uncle subsequently wrote to the nephew, offering to pay £30 and 15 shillings and saying, ‘If I hear no more about him, I consider the horse mine at that price.’ The nephew was on the point of selling off some of his property in an auction. He did not reply to the uncle’s letter, but did tell the auctioneer to keep the horse out of the sale. The auctioneer forgot to do this, and the horse was sold. It was held that there was no contract between the uncle and the nephew. The court felt that the nephew’s conduct in trying to keep the horse out of the sale did not necessarily imply that he intended to accept his uncle’s offer – even though the nephew actually wrote afterwards to apologise for the mistake – and so it was not clear that his silence in response to the offer was intended to constitute acceptance. This can be criticised in that it is hard to see how there could have been clearer evidence that the nephew did actually intend to sell, but, on the other hand, there are many situations in which it would be undesirable and confusing for silence to amount to acceptance.

An exception to this is the case of unilateral contract where the offeree is not required to give notice of his acceptance. All that he needs to do is to perform the act
desired by the offeror. This kind of contract doesn’t require a notice of acceptance. You just perform!

**INNEFFECTIVE TYPES OF ACCEPTANCE**

Certain situations exist in which the acceptance of an offer would only but become ineffective. These situations include:

- **Counter offer**
- **Conditional acceptance**
- **Cross offer**
- **Acceptance in ignorance.**

1. **Counter offer:**

An acceptance must correspond with the terms of the offer. A variation in the terms of the offer will constitute a counter offer. This invalidates or cancels the original offer. There must be a meeting of the minds between the offeror and the offeree; such that acceptance must be consistent with the terms of the offer. In summary, there must be **consensus ad idem**. Where there is a counter offer, it becomes a new which the original offeror is either free to accept or reject. Thus, in *Hyde v Wrench*, where the defendant on June 6, offered to sell an estate to the plaintiff for £100. On June 8, the defendant replied with an offer to buy the estate for £950. This was rejected by the defendant. However, the plaintiff sued for specific performance. [It was held that the plaintiff was not open to buy the estate for £950. The plaintiff made a counter offer].

**NB.** If a counter offer is accepted by the original offeror, it creates a binding obligation or contract between the parties. The original offeror’s acceptance of the counter offer may be by **express words** or by **conduct**.

In the Nigerian case of *Oni v Communications Associate ltd*. The plaintiff offered to lease two flats to the defendants at £200. The defendants replied accepting the offer and said that A/C should be installed by the plaintiff. The plaintiff accordingly did so. Subsequently, the defendants refused to take up the flats. [It was held by the court that there was a valid contract].
2. Conditional acceptance / provisional acceptance

Conditional acceptance is a kind of acceptance that is predicated upon the fulfilment of certain condition(s). Thus for this kind of contract to be binding, the offeree must fulfil certain conditions. An example that comes to mind here is the “jamb provisional admission statement”. If you are very observant, you would discover that upon the printing of your admission letter, you would discover that “Letter of Provisional Admission” is what is written on it. Thus, for you to become a student of whatever school you were offered admission, you need to accept the admission. Yes/no?

Also, where the ‘purchase of land’ is made subject to contract, there would be no contract unless and until a formal contract is drafted out. In Tiverton Estate Ltd. V Wearwell. Here in, the defendant was bound by an agreement under which he agreed to sell his home ‘subject to contract’ [it was held by the court of appeal that the agreement was not binding]. NB. The same would be the case even if part payment was made in respect of that subject.

Also, going by the case of Maja Juniors v UAC where full payment was made. The effect of this is that—there still wouldn’t be any contract, if such an agreement was made subject to contract. Of a truth, this would definitely have wrought injustice on the part of the plaintiff. This is so because he might have parted with some money.

The supreme court had the opportunity to amend this unbecoming state of law in the case of Tejumola v UBA. However, the ruling of the court remained the same as in the earlier cases. In my own opinion, I feel that the court should have exercised their discretionary power to deviate from this wicked principle which wrought injustice to plaintiffs.

Provisional acceptance

There is a mist of controversy surrounding this particular principle of law as to whether it has the same effects as ‘subject to contract’. However, the term has been described as a magical term which confers binding qualities to an agreement. It is one in which the effect can only be determined from the context of usage, and circumstances peculiar to each case. Furthermore, this principle creates the impression that ‘terms’ confers a valid contract on the parties. But subsequent decisions show that the effect of
the terms depends on the peculiarities of each case. In *Branca v cobarro*, where the defendant agreed to sell a farm to the plaintiff. The agreement contained the following clause “this is a provisional agreement. Until a fully legalised agreement is drawn by a solicitor and embodying all the conditions there in stated is signed” [the court held that the parties intended to be bound from the beginning of the contract. this decision was arrived at based on the fact peculiar to it].

Subsequent to this, the Nigerian court in *AGF v Awojoodu* blindly followed this terrible principle which ultimately led them to error. Held that the defendant was contractually bound to the federal government of in the following circumstances. The plaintiff government offered the defendant scholarship to study Accountancy in the UK. The letter read that he had been offered a “provisional scholarship” and that “your acceptance of the provisional award does not place you under any obligation whatsoever with the federal government, until you sign and execute this bond to that effect”. He accepted this award on those terms, and did not sign the bond. The plaintiff sued to recover the scholarship. The defendant contended he was not liable, since the plaintiff never signed the bond. NB. Because “provisional clause” was used, the court held that there was no contract between the parties.

From the foregoing however, it should be clear already that the term “provisional agreement” has not been infested with a precise meaning as against subject to contract. if it must be mentioned at all, it should be seen as that the contract has not yet ripened or mature into a contract.

3. **Cross Offer:**

This happens when two identical offers are sent by two parties to each other cross in transit or by post. For example, If D writes to K offering to sell his bicycle for #16 000, and by coincidence K happens to write offering to buy the bicycle for #16 000, the two letters crossing in the post, do the letters create a contract between them? On the principles of offer and acceptance it appears not, since the offeree does not know about the offer at the time of the potential acceptance. NB. Two identical offers cannot make a contract. the mere willingness by both parties to make the same bargain does not
constitute a contract, unless one is made in reference to the other. More so, since there is no meeting of the minds in a cross offer scenario, there can be no valid acceptance!

It should be noted that since there is no meeting of the minds, an acceptance of an offer by an uninformed person cannot make a valid acceptance. Thus in order to create a binding contract, the parties must reach agreement. If their wishes merely happen to coincide, that may be very convenient for both, but it does not constitute a contract and cannot legally bind them. Thus, if T advertises a reward for the return of a lost cat and Q, not having seen or heard of the advertisement, comes across the cat, reads T address on its collar and takes it back to T. T is bound to pay Q the reward? No English case has clearly decided this point, and the cases abroad conflict with the main English case. On general principles Q is probably unable to claim the reward.

The main English case on this topic is Gibbons v Proctor. A reward had been advertised for information leading to the arrest or conviction of the perpetrator of a particular crime and the plaintiff attempted to claim the reward, even though he had not originally known of the offer. He was allowed to receive the money, but the result does not shed much light on the problem because the plaintiff did know of the offer of reward by the time the information was given on his behalf to the person named in the advertisement.

Subsequent upon the Australian case of R v Clarke, it would appear that if the offeree knew of the offer in the past but has completely forgotten about it, they are treated as never having known about it. In that case a reward was offered by the Australian Government for information leading to the conviction of the murderers of two policemen. The Government also promised that an accomplice giving such information would receive a free pardon. Clarke was such an accomplice, who panicked and provided the information required in order to obtain the pardon, forgetting, at the time, about the reward. He remembered it later. [It was held that he was not entitled to the money].
COMMUNICATION OF ACCEPTANCE

An acceptance does not usually take effect until it is communicated to the offeror. As Lord Denning explained in *Entores Ltd v Miles Far East Corporation*, if A shouts an offer to B across a river but, just as B yells back an acceptance, a noisy aircraft flies over, preventing A from hearing B’s reply, no contract has been made. A must be able to hear B’s acceptance before it can take effect. The same would apply if the contract was made by telephone, and A failed to catch what B said because of interference on the line; there is no contract until A knows that B is accepting the offer. The principal reason for this rule is that, without it, people might be bound by a contract without knowing that their offers had been accepted, which could obviously create difficulties in all kinds of situations. Where parties negotiate face to face, communication of the acceptance is unlikely to be a problem; any difficulties tend to arise where the parties are communicating at a distance, for example by post, telephone, telegram, telex, fax or messenger.

Acceptance by POST.

The general rule for acceptances by post is that they take effect when they are posted, rather than when they are communicated. The main reason for this rule is historical, since it dates from a time when communication through the post was even slower and less reliable than it is today. Even now, there is some practical purpose for the rule, in that it is easier to prove that a letter has been posted than to prove that it has been received or brought to the attention of the offeror.

The postal rule was laid down in *Adams v Lindell* (1818). On September 2, 1817; the defendants wrote to the plaintiffs, who processed wool, offering to sell them a quantity of sheep fleeces, and stating that they required an answer ‘in course of post’. Unfortunately, the defendants did not address the letter correctly, and as a result it did not reach the plaintiffs until the evening of 5 September. The plaintiffs posted their acceptance the same evening, and it reached the defendants on 9 September. It
appeared that if the original letter had been correctly addressed, the defendants could have expected a reply ‘by post’ by 7 September. That date came and went, and they had heard nothing from the plaintiffs, so on 8 September they sold the wool to a third party. The issue in the case was whether a contract had been made before the sale to the third party on 8 September. [The court held that a contract was concluded as soon as the acceptance was posted, so that the defendants were bound from the evening of 5 September, and had therefore breached the contract by selling the wool to the third party]. (Under current law there would have been a contract even without the postal rule, because the revocation of the offer could only take effect if it was communicated to the offeree – selling the wool to a third party without notifying the plaintiffs would not amount to revocation. However, in 1818 the rules on revocation were not fully developed, so the court may well have considered that the sale was sufficient to revoke the offer, which was why an effective acceptance would have to take place before September 8.)

However, in Nigerian, the inefficiency of the postal service is a pain in the ass and a strong factor capable of undermining the rational for the application of the rule. This rule was further stretched to its limit in House Hold Fire ins v Grant. where the English court relied on the authority of Adams & lindsell. [The court held that there was a valid acceptance; where the letter of acceptance was lost in the post].

Exception to The POSTAL RULE

✓ Acceptance must be Communicated:
An offeror may avoid the postal rule by making it a term of their offer that acceptance will only take effect when it is communicated to them. In Holwell Securities Ltd v Hughes the defendants offered to sell some freehold property to the plaintiffs but the offer stated that the acceptance had to be ‘by notice in writing’. The plaintiffs posted their acceptance, but it never reached the defendants, despite being properly addressed. The court held that ‘notice’ meant communication, and therefore it would not be appropriate to apply the postal rule.
Communication must be Instant:

When an acceptance is made by an instant mode of communication, such as telephone or telex, the postal rule does not apply. In such cases the acceptor will usually know at once that they have not managed to communicate with the offeror, and will need to try again.

In *Entores v Miles Far East Corporation*, the plaintiffs were a London company and the defendants were an American corporation with agents in Amsterdam. Both the London company and the defendants’ agents in Amsterdam had telex machines, which allow users to type in a message, and have it almost immediately received and printed out by the recipient’s machine. The plaintiffs in London telexed the defendants’ Amsterdam agents offering to buy goods from them, and the agents accepted, again by telex. The court case arose when the plaintiffs alleged that the defendants had broken their contract and wanted to bring an action against them. The rules of civil litigation stated that they could only bring this action in England if the contract had been made in England. [The Court of Appeal held that because telex allows almost instant communication, the parties were in the same position as if they had negotiated in each other’s presence or over the telephone, so the postal rule did not apply and an acceptance did not take effect until it had been received by the plaintiffs. Because the acceptance had been received in London, the contract was deemed to have been made there, and so the legal action could go ahead].

Where acceptance is Miss-directed:

Where a letter of acceptance is lost or delayed because the offeree has wrongly or incompletely addressed it through their own carelessness, it seems reasonable that the postal rule should not apply, although there is no precise authority to this effect. Treitel, a leading contract law academic, suggests that a better rule might be that if a badly addressed acceptance takes effect at all, it should do so at the time which is least advantageous to the party responsible for the misdirection.
TERMINATION OF AN OFFER

An offer may be terminated in any of the following ways, to wit-

- **Revocation**
- **Lapse of time**
- **Death**
- **Rejection**

**Revocation:**

It should be borne in mind that an offer may be revoked before acceptance is communicated by the offeree. Furthermore, the term “revocation” is also used interchangeably with “Withdrawal of offer.” Subsequent to above, the old case of **Payne v Cave** establishes the principle that an offer may be withdrawn at any time up until it is accepted. In **Routledge v Grant**, the defendant made a provisional offer to buy the plaintiff’s house at a specified price, ‘a definite answer to be given within six weeks from date’. [It was held that, regardless of this provision, the defendant still had the right to withdraw the offer at any moment before acceptance, even though the time limit had not expired]. NB. **Withdrawal must be communicated.** It is not enough for the offeror simply to change their mind about an offer; they must notify the offeree that it is being revoked. In **Byrne & Co v Leon Van Tienhoven**, the defendants were a company based in Cardiff. On 1 October they posted a letter to New York offering to sell the plaintiffs 1,000 boxes of tin plates. Having received the letter on 11 October, the plaintiffs immediately accepted by telegram. Acceptances sent by telegram take effect as soon as they are sent. In the meantime, on 8 October, the defendants had written to revoke their offer, and this letter reached the plaintiffs on 20 October. [It was held that there was a binding contract, because revocation could only take effect on communication, but the acceptance by telegram took effect as soon as it was sent]. In this case nine days before the revocation was received. By the time the second letter reached the plaintiffs, a contract had already been made. The revocation of an offer does
not have to be communicated by the offeror; the communication can be made by some other reliable source.

**Lapse of Time:**
An offer may set a specific time limit within which his offer can be accepted since he is the master of the offer. At the end of the time limit, the offeree’s power of acceptance automatically is determined (terminates). In other words, Where the offeror has not specified how long the offer will remain open, it will lapse after a reasonable length of time has passed. Exactly how long this is will depend upon whether the means of communicating the offer were fast or slow and on its subject matter – for example, offers to buy perishable goods, or a commodity whose price fluctuates daily, will lapse quite quickly. Offers to buy shares on the stock market may last only seconds. In *Ramsgate Victoria Hotel v Montefiore*, the defendant applied for shares in the plaintiff company, paying a deposit into their bank. After hearing nothing from them for five months, he was then informed that the shares had been allotted to him, and asked to pay the balance due on them. He refused to do so. [the court upheld his argument that five months was not a reasonable length of time for acceptance of an offer to buy shares, which are a commodity with a rapidly fluctuating price. Therefore, the offer had lapsed before the company tried to accept it, and there was no contract between them].

**Death of the offeror/offeree:**
On one hand, the position is not entirely clear, but it appears that if the offeree knows that the offeror has died, the offer will lapse; if the offeree is unaware of the offeror’s death, it probably will not. In *Bradbury v Morgan*. So if, for example, A promises to sell her video recorder to B, then dies soon after, and B writes to accept the offer not knowing that A is dead, it seems that the people responsible for A’s affairs after death would be obliged to sell the video recorder to B, and B would be obliged to pay the price to the executors. However, where an offer requires personal performance by the offeror (such as painting a picture, or appearing in a film) it will usually lapse upon the death of the offeror.
On the other hand, it seems probable that the offer lapses and cannot be accepted after the offeree’s death by the offeree’s representatives.

**Rejection:**
An offer lapses when the offeree rejects it. If Anu offers to sell Bola her car on Sunday, and Bola says no, Bola cannot come back on Saturday and insist on accepting the offer. Having said that, a rejection of an offer will not become effective unless it is communicated to the offeror.
In its very basic form, consideration is what you give or offer in response to an offer or an agreement. Eg, if Mrs S wishes to sell her I PAD and then Mr C wants to buy it. The PRICE he is going to pay is the ‘consideration’. Thus, if Mr C after the entire bargain pays #60 000 to Mrs S. That would have been regarded as a good (sufficient) price should she accept.

Having said that, the most often repeated definition of consideration is that of LUSH J in Currie v Misa. He contended that:

“consideration is a benefit to the promisor or a detriment to the promise. It may consist in some benefit, interest, promise or benefit accruing to one party or some forbearance, detriment, loss or responsibilities-given or suffered, undertaken by the other”

NB. To enforce consideration, you must prove that you have CONFERRED/SUFFERED a detriment. More so, the main idea behind consideration is the principle of RECIPROCITY. i.e, if you have an agreement with a person and the other fails to carry out their own end of the bargain while you have furnished consideration, you may/can sue. However, you will not be able to enforce consideration where it is merely a GRATUITOUS/DOMESTIC AGREEMENT. Eg, where your mum says she will get you a bicycle tomorrow. If she doesn’t get it as at then, what will you do? Will you take her to court?

Similarly, Moral Obligation does not constitute a valid consideration. Thus in Faloughi v Faloughi, it was held that the transfer of shares by a father to one of his sons on the basis of love and affection is not enforceable. i.e., simply because a man is your father does not mean you should sue him if he doesn’t will anything to you.

There are basically three types of consideration. They are:

1. Executory consideration:

This is an agreement that is entered into by two parties where the terms of the contract will be carried out at a much later date. In other words, this is an agreement that would be fulfilled in the future. Eg, if Seyi contacts Ayuba to draw a plan for a house for him
and subsequent to the agreement, the plan should be executed after four (4) months. This is *prima facie* an executory contract/agreement.

2. **Executed Consideration:**

   This is an action performed in response to a promise or contract. E.g, please help me find my missing vehicle and you will get a bicycle. If you find it, the reward would be the bicycle. Also, you may see the case of *Carlil v Carbolic Smoke Ball Co. Ltd*.

3. **Past Consideration:**

   In very practical terms, this is a consideration furnished when there isn’t any *prima facie* agreement. Eg, your partners at work were only just talking of how to construct a Morden bridge. having heard that, you went to buy some materials for the construction without any meeting between the parties involved. In pidgin English, **WHO SEND YOU? WHO YOU EPP!**

   Generally speaking, this kind of consideration is not the best. In fact, it is an advice to people who cannot control themselves to please be calm in instances involving money or a contract, otherwise, they would incur so much loss. Considering the *Re MacAdle’s case*, where a testator, made a gift of a house jointly to children. The wife of one of the children living in the same house (felt she was too big to live in such a house) spent a lot of money, reconstructing and renovating the house. Later, upon a suit where she sued for the enforcement of consideration, [the court held that the children are not bound to a pay her as there was no binding contract between her and the family members]. However, the four children jointly signed to give her €488 for her expenses.

   Also, examining the case of *Roscorla v Thomas* where the defendant sold the plaintiff a horse. After the sale was completed, the defendant told the plaintiff that the animal was ‘sound and free from any vice’. *This turned out to be rather far from the truth, and the plaintiff sued.* The court held that the defendant’s promise was unenforceable, because it was made after the sale. If the promise about the horse’s condition had been made before, the plaintiff would have provided consideration for it by buying the horse. As it was made after the sale, the consideration was past, for it had not been given in return for the promise.
ADEQUACY OF CONSIDERATION

It is a well settled fact the law would not enter into an enquiry as to the adequacy of a consideration. It is however, not the business of the court of law to measure the comparative value and the promise given by the plaintiff in exchange for it. It is the business of the court however to look into some agreement and scrutinise whether is fair or not. Subsequent to this, the court held once again in *Faloughi v Faloughi* that:

“once consideration is of some value in the eye of the court, even the court has no jurisdiction to determine whether it is adequate or inadequate”

On the contrary, in *African Petrol Ltd v Owodunni*, it was revealed that the accommodation in which the appellant provided to the respondent was worth #65 000 per/annum. However, by the agreement between the parties, the respondent was only paid #400. Even though the court discovered that this was nothing compared to a fair price, and in fact called it a “CHIKEN CHANGE,” it nevertheless, permits the court to descend into the arena to make a reasonable contract for the parties nor enquire into the adequacy of the consideration involved.

SUFFICIENCY OF CONSIDERATION

Although consideration must provide some benefit to the promisor or detriment to the promisee, these do not have to amount to a great deal. This principle is usually described in the rather confusing phrase ‘consideration must be sufficient but need not be adequate’, which effectively means that the courts will not inquire into the adequacy of consideration, so long as there is some. Providing something is given in return for a promise, it does not matter that it is not much, or not what the promise would usually be considered to be worth. Thus, in *Thomas v Thomas*, the plaintiff was a widow whose husband had stated that if he died before his wife, she should be allowed to live in his house for the rest of her life, after which it was to pass to his sons. When the man died, the defendant, who was his executor, agreed that the widow could continue to occupy the house in return for a promise that she would pay £1 a year and keep the house in good repair. Despite this, sometime later, the defendant tried to evict the widow, so she sued for breach of contract. The defendant claimed that the earlier promise was not
binding because of lack of consideration. However, [the court held that the widow’s promise to pay £1 and keep up the repairs was sufficient consideration to make the owners’ promise binding].

NB. Subsequent upon then case of Thomas v Thomas, it was stated expressly that- the fact that a consideration is too small or too much, may elicit the fact that there is (fraud, duress or mistake) in the formation of the contract. In other words, the court wouldn’t matter or enquire into the adequacy of such a consideration if it is so clear that such a contract is made in the absence of FRAUD, DURESS/MISTAKE.

NB. Consideration must not be Illegal/Immoral

One thing that you should put at the back of your mind is that- the court will never enforce an illegal consideration. Eg, Jasper contracts Jolly to kill Josko simply because he is always around the girl Jasper likes (is crushing on). Should Jolly do as he is contracted and Jasper does not pay him in full, Jolly wouldn’t even dare to approach the court to enforce the balance. That is what is meant by the court not enforcing illegality. Also, consideration must not be vague.

VARIATION OF CONTRACTUAL DUTIES

By and large, this arises where the defendant or debtor as the case may be promises to perform more than he is bound to do with the consent of the plaintiff/creditor provided there is an extra element the debtor is bringing to the table. Furthermore, where someone owes another money and cannot pay the full amount, they will sometimes offer to pay a smaller sum, on the condition that the creditor promises to accept it as full settlement for the debt. In other words, the creditor agrees not to sue later for the full amount. Even if such an agreement is made, it is only binding if the debtor provides some consideration for it by adding some extra element. Shall we examine a very old case to illuminate this principle. Thus in Pinnel’s Case (1602) Pinnel sued Cole for £8 10s, which Cole owed on a bond (a promise under seal to pay money). The debt had become due on 11 November. Cole argued that at Pinnel’s request, he had given him £5 2s 6d on 1 October, which Pinnel had accepted in full settlement of the
deb. Pinnel actually won the case on a technicality, but the court made it clear that had it not been for that technicality, they would have found in favour of Cole, because of the fact that he had made payment earlier than the due date, and this amounted to fresh consideration for the promise to accept less than the full amount. The court stated that the:

‘Payment of a lesser sum on a due date in satisfaction of a greater debt cannot be any good satisfaction for a greater sum. But a change in time or mode of payment, or the addition of the gift of a hoarse, hawk, or robe in satisfaction is good; for it shall be intended that a hoarse or a robe or a hawk might be more beneficial to the plaintiff than money for the [creditor’s promise to forgo his debt].’

In other words, if the debtor pays early, or in a more convenient place, or gives something else as well as the part-payment, the creditor is receiving some benefit and the debtor some detriment, and this is fresh consideration for the creditor’s new promise to accept part-payment and not insist on getting the whole amount. Suppose, for example, if Kehinde lends Alabi #100,000, and they agree that Alabi will pay the money back in one month’s time. If Kehinde arrives on the appointed date, to find that Alabi only has #30,000, and will only hand over that amount if Kehinde agrees that it is in full settlement for the debt, Kehinde can agree to this, and still sue Alabi for the other #70,000 later. *Please observe* Alabi has given no consideration for Kehinde’s promise to accept the part-payment, and so the promise is not binding. If, however, Alabi pays the #50,000 before the month is up, or offers Kenny #50,000 and a blazer, thus if in this circumstances Kehinde agrees to accept the part-payment as full settlement, that promise will be binding because Alabi has furnished consideration for it.

This rule was judicially approved in Foakes v Beer (1884), where Mrs Beer was owed £2,090 by Dr Foakes, on what is known as a judgment debt. She could have obtained a court order for the seizure and sale of his property to pay the debt, but instead she agreed that he could give her £500 immediately, and pay the rest in instalments. If he did this, she said, she would not take legal action. Interest is usually payable on a judgment debt, but their agreement did not mention this. However, when
Dr Foakes had paid off the debt, Mrs Beer asked for the interest as well. Dr Foakes refused to pay it, relying on their agreement. Mrs Beer sued, claiming that there was no consideration for the agreement. [The House of Lords upheld her claim by applying the rule in Pinnel’s Case: payment of part of the debt did not in itself constitute consideration for Mrs Beer’s promise to forgo the balance].

PROMISSORY ESTOPPEL

The doctrine of promissory Estoppel is to the effect that – if a person makes any false representation to another and that other acts on the representation; the person who has made that representation shall not after all be allowed to go back on their words if the other has relied on it. Thus, when a party has waved his contractual right against another and that other has justifiably and substantially changed his position in reliance to the waver. Thus, it is unjust to allow an action against him based on the original contract. Eg, if Bado has relied on the words of 2face being his manager to proceed with the contract. Thus, it would be unjust if 2face brings an action based on his former statement. It would be against equity and good conscience.

The essence of this doctrine is that Equity will estop a party from denying his contractual obligation based on the fact that the beneficiary furnished any consideration. Furthermore, this doctrine also helps to support the promise as a substitute for consideration. This doctrine is also known as Equitable Estoppel.

The case of Hughes v Metropolitan Railway Co 1877, where a landlord and his tenants, is usually seen as the starting point for the doctrine. Under the lease, the tenants were obliged to keep the premises in good repair, and in October 1874 the landlord gave them six months’ notice to do some repairs, stating that if they were not done in that time, the lease would be forfeited. In November, the two parties began to negotiate the possibility of the tenants buying the lease, the tenants stating that in the meantime they would not carry out the repairs. By December, the negotiations had broken down, and at the end of the six-month notice period, the landlord claimed that the lease was forfeited because the tenants had not done the repairs. [The House of
Lords held, however, that the landlord’s conduct was an implied promise to the tenants that he would not enforce the forfeiture at the end of the notice period, and in not doing the repairs, the tenants had been relying on this promise (the six-month notice period had started again from the date when the negotiations broke down). The promise was held to be binding.

This principle is further illustrated in *Central London Property Trust Ltd v High Trees House Ltd* 1947 where the plaintiffs owned a block of flats. In September 1939, the plaintiffs had leased the block to the defendants, who planned to rent out the individual flats, use the income to cover their payments on the lease, and make a profit on top. Unfortunately, their plans were rather spoilt by the fact that the Second World War had just broken out, and many people left London, making it difficult to find tenants. As a result, many of the flats were left empty. The plaintiffs therefore agreed that the defendants could pay just half the ground rent stipulated in the lease. By 1945, the flats were full again, and the plaintiffs claimed the full ground rent for the last two quarters of 1945. The plaintiffs stated that the agreement was only ever intended to last until the war was over, or the flats fully let, whichever was the sooner. Both events had happened by the time payment for the last two quarters of 1945 were due, and so they believed that they were entitled to full payment for that period. The court accepted this argument, holding that the full rent was payable for the two quarters in question, and from then on. *Of more importance is the fact* that Denning J went on to state that the plaintiffs would not have been entitled to recover the rent for the period 1940–45, even though there was no consideration for the promise to accept the reduced rent, because of the equitable principle laid down in Hughes. In fact, this reasoning which was an obiter, because the plaintiffs were not actually seeking to recover all the past rent) went further than that put forward in Hughes. Summarily, Denning J declared that the landlord’s claim for their full contractual rights for the period 1940–45 had been destroyed – by accepting the reduced rent for the wartime period, they lost their right to claim for arrears of rent, rather than simply suspending it until the tenants could afford to pay.

**NB.** What is worthy of note is that once you have given a promise to the other party, it is enough for consideration. This principle has however been applied to several
Nigerian cases. For example, in *Offiong v African Development Corporation Ltd* incaso, the appellant was employed as the company secretary in 1957, and was promised a car loan of £600 at the time of his appointment. Company instead offered him the used chairman’s car for £643, 13s,4p. he accepted this reluctantly such that at his retirement in 1960, he was only able to pay £300. He requested that the company forgo the remaining £346,13s,4p and still allow him take the car. The company agreed after considering the circumstances in which the car was given to him; and that the car was over hauled. The company resolved to grant him the car. subsequently, a new management came and sued for the performance of the balance of the obligation.i.e. *the remaining balance*. [The court per De Lestang relying on the principle in *High trees case* held that Offiong was released from the obligation of paying the balance].

Furthermore, in *Tika Tore Press v Abina* where the plaintiff’s company brought an action against the defendant for the ‘Balance of Monies’. Incaso, the plaintiff ordered a consignment of goods which upon arrival remained unsold for a time. The defendant therefore offered to buy the goods but pay upon the successful sale of the good. Unfortunately, he also could not sell the goods and the goods were in fact, deteriorating in the stores. They explained to the plaintiff who in turn requested that they should pay £1200 in full discharge of the debt and that the book balance of £2,465 be written off. The former paid and the latter subsequently brought an action for the balance of £1,265 on the ground that the defendant did not furnish no consideration for the promise to write the debt off. [the court held that the plaintiff was bound by their promise]. The court subsequently applied the principle in *high Trees Case*.

Subsequent to the above, the plaintiff must prove the following in order to rely on the principle of promissory Estopel; to wit:

1. There must have been a prior agreement between the plaintiff and the defendant which the defendant owes an obligation to the plaintiff.
2. The plaintiff must have waived partly or wholly his rights against the defendant
3. The defendant must have given no consideration for the waiver so as to make it binding in law.
4. The defendant must have altered a position to his detriment in reliance of the waiver so that it would be inequitable to allow the plaintiff to insist on the terms of the original agreement.

Thus, the following question comes to mind;

I. **DOES PROMISSORY ESTOPEL SERVE AS A SWORD / A SHIELD?**
   Comment.

II. **DOES PROMISSORY ESTOPEL GIVE RISE TO A COURSE OF ACTION?**

   To begin with, the doctrine cannot give rise to a course of action as litigants cannot use it as a ground or basis to litigate. It can only be used in defence of an action brought by the promisor. It is usually expressed by the saying: “Promissory Esopel can only be used as a shield and not as a sword”. Thus in *Combre v Combre*, the amiable Lord Denning, MR contended thus:

   “promissory Estopel does not create a new course of action where none existed before. It only defends a party from insisting upon his legal rights when it would be unjust to allow him enforce them having regards to the dealings which has taken place between them.”
This concept may be viewed as the express indication or manifestation of the parties to a contract that their transactions would be subjected to legal interventions by a court or constituted authority, to compel or enforce the performance of obligation entered into (willingly) by the parties to such a contract. In simpler words-the parties to a particular contract intend to enter into a serious business. No be play-play (Prof Odunsi). In furtherance to the above, for any contract to be enforced at law, there must be an intention to create legal relationship.

To determine intention to create legal relationship, the law highlights two rebuttable presumptions. To wit:

1. There is a rebuttable presumption that parties do not intend to create legal relations when they enter into a domestic or social agreement; and
2. There is a rebuttable presumption that parties do intend to create legal relations when they enter into a commercial agreement.

1. Social/Domestic Agreement:
This is usually a contract between parents and children, siblings or a husband and wife living together in amity. Thus where an agreement is made between them, the courts will assume that they do not intend to be legally bound, unless there is evidence to the contrary. Thus in Balfour v Balfour the defendant was a civil servant stationed in Ceylon (now Sri Lanka). While the couple were on leave in England, Mrs Balfour was taken ill, and it eventually became clear that her husband would have to return by himself. He promised to pay her a monthly maintenance allowance of £30. They later decided to separate, upon which the husband refused to make any more payments. The Court of Appeal decided he was not bound to pay the allowance because at the time when the agreement was made there was no intention to create legal relations. [Atkin LJ said- it was a family matter when this agreement was made between the husband and wife in which the courts really had no place to interfere].
NB. This position would change if the couple are divorced or judicially separated. It would be intended that the parties want to be bound if they enter into any commercial or contractual agreement. Thus in Merritt v Merritt, Mr Merritt had left his wife to go and live with another woman, and subsequently met his spouse to resolve various financial arrangements. Sitting in Mr Merritt’s car, they decided that he would pay his wife £40 a month, out of which she was to pay the outstanding mortgage payments on their house; he would transfer the house to her sole ownership when the mortgage was paid off. Mrs Merritt then refused to get out of the car until her husband put the agreement in writing. Eventually, he signed a piece of paper stating what they had agreed. The wife duly paid off the mortgage, but the husband then refused to transfer ownership of the house to her. [The Court of Appeal upheld the wife’s claim. Lord Denning pointed out that the presumption applied in Balfour v Balfour, that an agreement between husband and wife was ‘a family arrangement’, was not valid where the parties had separated or were about to do so. In such circumstances the parties ‘do not rely on honourable understandings’, but ‘bargain keenly’, and it could be safely presumed that any agreement between them was intended to be legally binding.]

2. Commercial agreements:
There is a strong presumption in commercial agreements that the parties intend to be legally bound, and, unless there is very clear contrary evidence, this presumption will not be rebutted.

In Esso Petroleum Ltd v Customs and Excise Commissioners. Esso ran a sales promotion in which ‘coins’ showing members of the England football squad for the 1970 World Cup were to be given away free, one with every four gallons of petrol. The scheme was advertised on television and by posters at filling stations. The case arose when for tax purposes it became necessary to decide whether or not there was a contract of sale did a motorist who bought four gallons of petrol have a contractual right to one of the coins? [The House of Lords held, by a majority, that the coins were not being sold, and so were not liable for tax, but that there was intent to create legal relations. Lord Simon pointed out that ‘the whole transaction took place in a setting of business
relations’, that it was undesirable to allow companies to make promises in advertisements that they were not bound to keep, and that Esso knew that, despite the coins’ negligible monetary value, they would be attractive to motorists and Esso would therefore derive considerable commercial benefit from the scheme.

MERE PUFFS

Where an offer is extremely vague, too good to be true or clearly not intended to be taken seriously, the law will not give its acceptance contractual effect. For example, when someone sees another as short as a dwarf and he tells that other person to drink a container of Milo chocolate drink per/week that he would be tall. Thus, if that other person does so and doesn’t become tall, will that person be able to sue? The law would regard such to be a mere puff—just a statement to induce one into action.

In *Weeks v Tybald* however, *the defendant announced that he would give £100 to any suitable man who would marry his daughter, but it was held that his words were not intended to be taken seriously, and his promise was not legally binding.*

This principle is sometimes applied to the extravagant language used in advertising and sales promotions, but only if there is no evidence of contractual intent. In *Carlill v Carbolic Smoke Ball Co*, the defendants argued that their statement was ‘a mere puff’, an advertising gimmick which was never intended to be taken seriously. This contention was rejected by the court, pointing out that the advertisement stated that the company had deposited £1,000 with their bankers ‘to show their sincerity’, which was strong evidence that they had intended to be legally bound.
TERMS OF A CONTRACT

After all the preliminary negotiations leading to a contract, the next highly important thing is the body of the contract. i.e., (Terms of the contract- items which are very well articulated and agreed upon by the parties to the contract). The terms of a contract describe the duties and obligations that each party assumes under their agreement. As well as the contractual terms laid down by the parties themselves, known as express. Also, the court may discover from the unfolding of event, that certain terms which are not express but implied are contained in the contract as well. These are terms which are read into a contract because of the facts of the agreement and the apparent intention of the parties, or the law on specific types of contract.

EXPRESS TERMS.

For a term to be regarded as an express term, it would be the case that the terms of that contract was made either- orally (by word of mouth), written down, partly written or oral. Examine this- in any transactions whatsoever, there will be some negotiations before a contract is made. Companies making a deal for one to supply the other may hold detailed discussions about price, quality control and delivery; when hiring a firm to put in your central heating you might ask how long the job will take, what the price includes and who will do the work; and if you buy a tin of paint, a computer or a set of shelves, for example, you will want to know whether they are suitable for your particular purpose. In all these cases, oral statements will be made. Problems can arise when, although both parties agree that a certain statement was made, they can equally disagree on whether that statement was part of the contract and therefore intended to be binding. From this scenario, statements made during negotiations are classified by the courts as either REPRESENTATION or TERMS. A representation is a statement which may have encouraged one party to make the contract but is not itself part of that contract, while a term is a promise or undertaking that is part of the contract. Disputes generally centre around statements which have proved to be untrue: if that statement is a representation, it can give rise to an action for misrepresentation, whereas if it is a term, it can give rise to an action for breach of contract. Whether a statement is a representation or a term is largely a question of the parties’ intentions. If the parties
have indicated that a particular statement is a term of their contract, the court will carry out that intention. Thus to determine the category in which a statement falls, the following parameters shall be considered:

1. **The Time the Statement was made.**

   The more time that elapses between the statement being made and the contract being concluded, the less likely the courts will be to regard the statement as a term, though the cases show that this can only be an approximate guideline. In *Routledge v McKay*, the parties had been discussing the sale of a motorbike. Both were private individuals without specialist knowledge of motorcycles, and the defendant, drawing his information from the registration book, stated that the motorbike under discussion was made in 1942. When a written contract was drawn up a week later, it did not mention the age of the motorbike. The motorbike turned out to be a 1930 model, and the buyer claimed that the date of manufacture was a term of the contract. [His claim failed, because the interval between the statement being made and the contract concluded suggested that the statement was not a term].

   In *Schawel v Reade*, the plaintiff began to examine a horse that he was thinking of buying. The seller told him: ‘You need not look for anything: the horse is perfectly sound’, so the plaintiff did not make any further checks, and the sale was concluded three weeks later. When the horse in fact proved unsatisfactory, [the House of Lords held the strength and importance of the seller’s statement meant that it was a contractual term, despite the length of time between the statement being made and the contract being concluded].

2. **The Importance of the Statement.**

   A statement is likely to be seen as a term if the injured party has made the other party aware that had it not been for that statement, they would not have entered into the contract. In *Bannerman v White*, White was considering buying hops from Bannerman, and asked whether they had been treated with sulphur, adding that if they had, he would not even bother to ask the price. Bannerman said there had been no such treatment (believing this to be the truth) and, after negotiations, a contract of sale was made.
Later though, it was discovered that sulphur had been used on some of the hops; 5 acres out of 300. When Bannerman sued for the price, White claimed that Bannerman’s statement had been a term of the contract, and Bannerman had breached that contract, so he was justified in refusing to pay. [The court agreed that the statement about the sulphur was indeed a term of the contract].

3. Special knowledge and skill.

Where a statement is made by someone who has expert knowledge or skill that is relevant to the subject in hand, the courts will be more willing to deem that statement a term than if the same words were used by an amateur with no special expertise on the matter. This principle is illustrated by two cases involving the sale of cars. In **Dick Bentley Productions Ltd v Harold Smith (Motors) Ltd** where the plaintiffs had said they were looking for a ‘well-vetted’ Bentley car. The defendant, a car dealer, stated that the car he had for sale had had its engine and gearbox completely replaced, and had only done 20,000 miles since then. After the plaintiffs bought the car, problems emerged, and it transpired that the car had in fact done almost 100,000 miles since the replacements. [The Court of Appeal held that the dealer’s statement was a term of the contract].

However, in the contrasting case of **Oscar Chess v Williams**, the defendant, a private individual, wanted to trade in his old car and buy a new one. The price allowed for the old car depended on its age, and the defendant stated that it was a 1948 model, which was the year given in the vehicle’s registration book (the equivalent of the car registration document used today). On this basis the plaintiffs allowed £290 off the price of the new car. Later, they discovered that the registration book had been altered, presumably by a past owner: the car was in fact a 1939 model, which was only worth £175. The car dealers therefore sued the defendant for the difference in price between the two valuations, on the grounds that his assertion that the car was a 1948 model was a term of the contract, and he was therefore in breach. [The Court of Appeal rejected their claim, pointing out that the seller was a private individual who had innocently trusted the registration book, but the buyers were experienced car dealers and therefore
likely to be able, if anyone was, to spot the car’s real age. Consequently, the defendant’s statement was not a contractual term].

4. Verification Test.

The more emphatically a statement is made, the more likely the courts will be to regard it as a term. In *Ecay v Godfrey*, the seller of a boat told the buyer that it was sound, but suggested that nevertheless, the prospective buyer should have it surveyed. [The court held that this suggested that the statement was never intended to be taken as a term of the contract]. This result can be contrasted with that in *Schawel v Reade* (above), where the obvious strength and importance of the statement meant it was a term.

**THE EFFECTS OF CONTRACTUAL TERMS**

Different terms in a contract will clearly vary in their level of importance. For example, if I offer to sell *Kunle* my car with the engine in good condition, the paintwork unscratched and the ashtrays empty, clearly the first two terms are of rather more importance to you than the last, and my breaching that term will cause *Kunle* problems than violation of either of the others. Consequently, the law seeks to classify terms according to their importance, with the implications of a breach for the innocent party varying according to the type of term breached. For these purposes, there are four types of contractual term. They include:

- Fundamental terms,
- conditions,
- warranties, and
- innominate terms.

➢ **Fundamental Terms:**
This is a term that constitutes the main purpose of the contract. It is of the greatest importance in any contractual obligation. Thus, failure to comply with the terms therein,
is equivalent to non-performance. Furthermore, this is the very crux or the essence of the contract. If a party defaults, the substance of the contract is destroyed. For example, if Tade contracts J boy to supply him 100 bags of cement and J boy owing to the fact that he was in a haste when the contract was made, supplied 80 bags of custard powder. This is a typical scenario of a breach of contract. In this case, the innocent party is entitled to treat the contract as REPUDATED.

The locus classicus for this is the notorious case of Karsales v Wallis. Where Wallis entered into a contract of higher purchase with the plaintiff. He earlier inspected the car and he found out that the car was in a very perfect condition in tandem with the owner’s duty of merchantability. However, a clause in the contract read thus: “No condition of warranty that the vehicle is road worthy or as to its age, condition or fitness for any purpose is given by the owner or implied there in...” the car was shortly afterwards delivered at night. Wallis came out to inspect the car the next day and found out that the car was in a very bad state. [The original parts have been removed and more so, the car wouldn’t move. The court held that the car delivered wasn’t the one contracted for. Therefore, there is a fundamental breach, irrespective of the exception clause].

➢ Conditions:

A term which is clearly an important one, in the sense that a breach of it would have very significant consequences for the innocent party, will usually be regarded by the courts as a condition. Where a condition is breached, the innocent party is entitled to regard the contract as repudiated, and so need not render any further performance, and can also sue for damages.

➢ Warranty:

The word warranty usually describes a contractual term which can be broken without highly important consequences – such as our example of the car ashtray, above. A warranty is however a ‘collateral to the main purpose of [a contract of sale]’. If a warranty is breached the innocent party can sue for damages, but is not entitled to terminate the contract.
➢ **Innominate terms:**

these are terms which can be broken with either important or trivial consequences, depending on the nature of the breach. If the effects of the breach are serious, the term will act as a condition; if they are minor, it acts as a warranty. This is also known as ‘intermediate terms’.

**IMPLIED TERMS.**

In a negotiation for example, there will be express terms stated by the parties to that contract. However, there are certain terms which may not be expressly stated but are implied either by the court, custom or by statutes. These terms are simply to promote and protect the ordinary life of business. Eg, it is a custom to pay at least #20 at the filling station when you go with a container to get fuel. As mentioned earlier, there are 3 basic kinds of implied terms. They include: Terms implied by court, statutes & custom.

1. **Terms implied by COURT:**

Here, the courts are not always anxious to tamper with contracts made between parties, but they will imply a term when it is necessary in order to give the contract business efficacy. This is predicated on the idea that – the parties must have intended the terms to be in their contract. Although, they did not expressly make it so.

The test to determine the presumed intent of the parties is the **OFFICIOUS BY STANDER TEST.** i.e, (objectivity Test). This test was propounded in *The Moorcock* case 1889, where *the defendants owned a wharf and jetty on the river Thames which people could pay to use to load and unload their boats. The defendants contracted with the plaintiffs for the unloading of the plaintiffs’ boat, called The Moorcock, at their wharf. Both parties knew that the water level at the wharf was low and that the boat would have to rest on the river bed when the tide was down. This would be all right if the river bed was soft mud, but would damage the boat if it was hard ground. In fact, the boat was damaged when it hit a ridge of hard ground at low tide. The contract did not expressly state that the boat would be moored safely. The plaintiffs brought an action for compensation for the damage to the boat on the basis that there had been a*
breach of contract. [The Court of Appeal implied a term into the contract that the boat would be moored safely at the jetty. Such a term was necessary to give the contract business efficacy. Otherwise the boat owner ‘would simply be buying an opportunity of danger’. The term had been breached and the action for damages for breach of contract was therefore successful].

This principle was applied to the Nigerian case of *Okotete v Electricity Corp Nigeria*, where the defendant contracted the plaintiff to clear the bush for the purpose of installing electrical cables through Warri-Ugheli road. The plaintiff only cleared the bush and abandoned the felling of trees. He however brought an action for the money to fell the trees. [the court held that: the contract entailed an implicit term which includes felling down trees to enable the laying of electrical cables].

2. Terms implied by STATUTES:
The provision of the *Sale of Goods Act 1893* which is a SOGA in Nigeria is a good example of terms implied by statutes. This only limited only to the sale of goods. Now NB if certain terms are not expressly stated in an agreement, the provisions of the S12-15 SGA would automatically apply except they are intentionally excluded by the parties to the contract themselves. However, this I doubt a business man in his right senses would likely do. Some of the terms implied by statutes include:

- **Title** (for a person to be able to sell goods, he must be the owner)
- **Description** (the goods intending to be sold, must be according to what the eye saw)
- **Desirability**
- **Sample** (the goods must correspond with sample)
- **Merchantability** (the goods intending to be sold must be merchantable (K V W). Use this acronym to remember: S M A D D. Fill in the gap, cheers.

3. Terms implied by CUSTOM:
A contract is made subject to customary terms or usages prevalent within the sphere of a particular trade. However, where certain terms are not expressly stated there to, there
is a presumption that they are aware of this custom(s) and intend to be bound by them. In *British Crane Hire Corp Ltd v Ipswich Plant Hire Ltd*, the owner of a crane hired it to a contractor, who was engaged in the same sort of business. [It held that the hirer was bound by the owner’s usual terms, even though these were not actually stated at the time the contract was made]. *The owner’s terms were based on a model supplied by a trade association, and were common in the trade, and could therefore be implied into the contract in much the same way as terms implied by custom.*

It should be noted that a custom can be excluded from an agreement by express terms. Thus, where a custom is expressly excluded, the custom will not operate to override the express position of the contract. Furthermore, for a custom to be regarded or accepted as customary, such must have been well established and known to all who engage in the trade. The reverse would be the case if it is not well established.

**EXEMPTION CLAUSE(S)**

This is a scenario where a party to a contract may seek to avoid incurring liability for certain breaches of the contract, or may specify that their liability for such a breach will be limited, usually to a certain amount in damages. This is essentially a feature of a standard contract. A standard contract is one where- a party to the contract has more bargaining power than the other.

Usually, the courts don’t like exemption clauses. This is because they go against the whole essence of contract- ‘an assumption of rights and liabilities’. It has sought to control the use of these clauses, first by the efforts of the judges, and later by statutory intervention in the form of the Unfair Contract Terms Act 1977 (UCTA). More often than not, exemption clauses are usually contained in most contractual document in very tiny letters such that people wouldn’t notice what it is. You might even get board of reading it because they are usually very long.

Subsequent to the above, there are three ways in which exemption clauses may be incorporated into a contract, to wit: by **signature**; by **reasonable notice**; and by **previous course of dealing**.
1. **By Signature:**

If a document is signed at the time of making the contract, its contents become terms of that contract, regardless of whether they have been read or understood. This principle is known as the rule in *L’Estrange v Graucob* 1934. Incaso, a woman signed a hire-purchase agreement for a cigarette vending machine, without reading it. The agreement contained, in very small print, a broad exemption from liability for the product. When the machine proved defective, [it was held that signing the contract meant that the woman was bound by the exclusion clause, and therefore had no remedy].

However, this rule does not apply where there is any **misrepresentation** as to the nature of the document signed. Thus in *Curtis v Chemical Cleaning and Dyeing Co*, Ms Curtis took a wedding dress for cleaning, and was asked to sign a document exempting the cleaners from liability ‘for any damage howsoever arising’. She queried the document, but was told it simply meant the cleaners would not accept liability for any sequins or beads on the dress. She then signed. When she collected the dress, it had a stain which was not there before, but the cleaners denied liability, relying on the exclusion clause. [The Court of Appeal held that the statement made about sequins and beads misrepresented the effect of the clause, and therefore the cleaners could not rely on it, even though Ms Curtis had signed the document].

The court in *Wilton v Farnworth* 1948 contended that:

“In the absence of fraud or some other of the special circumstances of the character mentioned, a man cannot escape the consequences of signing a document by saying, and proving, that he did not understand it. Unless he was prepared to take the chance of being bound by the terms of the document, whatever they might be, it was for him to protect himself by abstaining from signing the document until he understood it and was satisfied with it. Any weakening of these principles would make chaos of every-day business transactions.”

In short, what the court is trying to tell us is that – you should take your time to read the terms of a contract well, before appending your signature.
Documents Mistakenly Signed.

It is the rule that a person is bound by the content of a document mistakenly signed by him. It would be immaterial whether or not the person read the document before appending their signature. But as usual, to every rule, there is an exception. In this case, if the signature is procured by (force, intimidation or misrepresentation), the person who made the contract is allowed to deny the veracity of the signature by pleading non est patum, i.e., “not my deed.” This doctrine was basically made for the ‘blind and illiterate’ who cannot read and write. However, even the literates have been included. This is so because as mentioned earlier, that you signed doesn’t mean you meant it neither was it your honest intention.

In Throughood’s case, an illiterate man executed a deed, witnessing to give his property to his tenant and his friend, instead of collecting arrears from them. This deed was however prepared by the tenant and his friend which gave the property to them. [the court held that the deed was void].

NB. A person making a plea of non est patum must fulfil two (2) conditions laid down in Foster v Mackinnon, to wit:

i. The document which he signed must be of a different class from the one he intended to sign.

ii. He must not have been negligent in signing the document.

2. Reasonable Notice:

If separate written terms are presented at the time a contract is made – by handing over a ticket, or listing them on a sign, for example – those terms only become part of the contract if it can be said that the recipient had reasonable notice of them. Many of the rules on reasonable notice arise out of what are called the ‘ticket cases’, which occurred during the nineteenth century with the rise of companies providing public transport by rail. This principle was laid down in Parker v South Eastern Railway, where the plaintiff left his bag in a station cloakroom, paid the fee of 2d and received a cloakroom ticket in return. On the front of the ticket was printed details such as opening hours of the office, and also the words: ‘See back’. On the back there was a clause limiting to £10 the company’s liability for the loss of property left with them. When the plaintiff
returned to collect his bag, it had been lost. The bag was worth £24 10s, so Mr Parker claimed that amount from the railway company; the company maintained that their liability was limited to £10. [The Court of Appeal said that a party could be deemed to have had reasonable notice if they knew of the clause, or if reasonable steps were taken to bring the clause to their notice. On the facts of the case the limitation had been incorporated into the contract, and the train company was only required to pay £10].

In deciding whether reasonable steps have been taken, the courts will look at when the notice was given, what form it took, and how serious and unusual the effect of the exemption clause is. As a rule, an exemption clause is only incorporated into the contract if notice is given before or at the time of contracting. In *Olley v Marlborough Court Ltd* where a married couple booked into a hotel for a week, and then went to their allotted room. On the wall of the room they found a notice stating that “the proprietors will not hold themselves responsible for the articles lost or stolen unless handed over to the management for safe keeping”. While the couple were out, Mrs Olley’s fur coats were stolen. The hotel disclaimed liability, relying on the words of the notice, [but the Court of Appeal held that those words had not been incorporated into the contract, because they came to the Olleys’ notice too late. The contract was made at the reception desk, and a new term could not then be imposed on them when they reached their room].

A similar issue arose in *Thornton v Shoe Lane Parking* 1971. The defendants ran a car park which motorists entered by taking a ticket from a machine, which triggered the raising of an automatic barrier. Mr Thornton did this, and parked his car, but when he returned to the car park later, there was an accident in which he was injured. The ticket stated that: “parking was subject to the conditions displayed on the premises, and the company would not accept responsibility for damage or personal injury”. When the plaintiff sued for damages, the defendants argued that they were exempt from liability, because of the clause. [In deciding whether the clause was in fact part of the contract, Lord Denning analysed the transaction in terms of offer and acceptance, in order to decide when the contract was complete. He reasoned that the offer was made by the car park proprietors placing the machine ready to receive money. Acceptance took place when the customer
drove up to the machine, and the contract was then complete. The terms printed on the ticket which was delivered a moment later by the machine therefore came too late].

3. **Previous course of Dealings.**

If two parties have previously made a series of contracts between them, and those contracts contained an exemption clause, that clause may also apply to a subsequent transaction, even if the usual steps to incorporate the clause have not been taken. In *Spurling v Bradshaw*, the parties had been doing business together for many years. The defendant delivered eight barrels of orange juice to the plaintiffs, who were warehousemen, for storage. A few days later, he received a document from them, acknowledging receipt of the barrels. Words on the front of the document referred to clauses printed on the back, one of which exempted the plaintiffs ‘from any loss or damage occasioned by the negligence, wrongful act or default’ of themselves or their employees. When the defendant went to collect the barrels, they were empty. He consequently refused to pay the storage charges, so the plaintiffs sued him. He counter-claimed for negligence and, in response, the plaintiffs pleaded the exemption clause. The defendant argued that the clause could not affect his rights because it was only sent to him after the conclusion of the contract. However, he admitted that he had received similar documents during previous transactions, though he had never bothered to read them. [The court held that the clause was incorporated into the contract by the course of the previous dealings].
EXEMPTION CLAUSE & BREACH OF FUNDAMENTAL OBLIGATION.
Fundamental breach has been defined per Lord Diplock in *Photo Production Ltd v Securicor Transport Ltd* as:

“an event resulting from the failure of one party to perform a primary obligation which has the effect of depriving the other party of substantially enjoying the whole benefit of the contract.”

More so, subsequent to the case of *Karsales v Wallis*, a party guilty of a fundamental breach cannot rely on the provisions of an exemption clause to evade liability.

A case illustrating this principle is the case of *Adel Mitchalli v Allied Commercial Exporters Ltd*, where a contract for the supply of cloth was entered into by the parties for cloths. At the supply of the goods (cloths), the sample was found wanting and short of quality as to the sample provided and which formed the basis of the agreement. The supplier relied on an exemption clause to avoid liability. However, the court held that: [the clause could not avail the defendant any protection. Furthermore, that the clause can only avail a party if he is carrying out the contract in its essential respect].

In the Nigerian case of *Sotayo Arogege v Nigerian Technical Company*, where the plaintiff contracted the defendant for a lorry on hire-purchase. The lorry indeed was bought and made only 3 trips which later landed it at the mechanic’s workshop. Upon a suit, the defendant relied upon the provision of an exclusion clause, exempting them from any liability thereof.

However, before 1966, it has been though that the doctrine of fundamental breach and its effect in relation to exemption clause, constituted a rule of substantive law that nobody was allowed to rely on it. This seemingly settled position of law was badly shaken in the *Suisse Atlantique* case 1967, where the matter was re-examined and the house of lords held that:

[“there was no rule of substantive law that an exclusion clause could never excuse liability for such a breach. Whether the clause covered the breach in question would always be a question of fact involving the interpretation of the contract.”]
This, then marked the end of the **RULE of LAW** and marked the beginning of the **RULE of CONSTRUCTION**. In short, this then means that parties are free to include exemption clauses in so far as they are clear and unambiguous; this would definitely protect them from liability.

Although the *Suisse Atlantique’s* case is generally regarded as deciding that – there is no rule of law which establishes that a fundamental breach of term, destroys an exemption clause. However, the ghost of the **RULE of LAW** interpretation resurfaced in -

*Harborts Plantistine’s* case 1970, where the trial judge held that [there had been a fundamental breach of contract which dis-entitled the defendant from relying on the exemption clause and limited their liability. The court further held that the negligence written on and leaving the plants un attended to, amounts to a fundamental breach, which brought the contract to an end.

The uncertainty and contradictions between the Suisse Atlantique’s case & Harbort plantistine’s case was finally settled in *Photo Production Ltd v Securicor Transport Ltd* 1980. Where *Photo Production* employed *Securicor* to protect their factory by means of a visiting patrol. A clause in their contract provided that: “under no circumstances shall the defendant company be responsible for any injurious act or default by any employee of the company”. One night, one of the Securicor guards lit a small fire inside the factory (for no rational reason so far as anyone could tell). The fire got completely out of control and destroyed the plaintiffs’ premises, at a cost of £615,000. [The House of Lords held that there was no rule of law that a fundamental breach could not be covered by an exclusion clause, and pointed out that since the Suisse Atlantique case, the Unfair Contract Terms Act 19779 (not applicable in Nigeria) had been passed, ensuring that exemption clauses could not be freely applied in consumer contracts. In commercial agreements, their Lordships pointed out, the parties were likely to be of roughly equal bargaining power, and to be able to cover their own risks by insurance (as in this case, where the case was actually being fought to decide which of the parties’ insurance companies should pay for the damage). Therefore, there was no need for a doctrine of fundamental breach. On the facts of the
case, [their Lordships decided that the exclusion clause clearly covered negligence, and so the defendants were allowed to rely on it].

It is worthy of note however, that the initial attitude of the Nigerian courts to the doctrine of exemption clauses viz –a-viz fundamental obligation is that of employing the **RULE of LAW** approach. i.e, **NO exemption clause would apply where a fundamental obligation or term is breached** in line with the decision in *Karsales v Wallis* as well as *Harboth plantistine*. This apparently ignores the rule of construction in force in England.

Sadly, in 1984, the supreme court started adopting the rule of construction which obviously is unbefitting and alien to our jurisdiction (where there is no Unfair Contract Term Act). The court in *Akinsanya v UBA* relied so greatly on the principle in *Photo Productions Ltd v Securicur transport* and this seemed so unfair to the plaintiff.

It should also be noted that the adoption of the rule of construction in Nigeria, is an uttermost disregard to our socio-cultural environment and state of development in Nigeria. It is the view of text writers that the supreme court need not follow the decision of the English court slavishly but, adopt the rule of law interpretation in tandem with the level of our development. More so, this should be the case where there is no legislation to protect consumers from unconscionable oppressive clauses.
There are some categories of people whose power to make contracts is limited by law. The main categories are: Minors, People of Unsound Minds & Drunkards. Contracts are of course not only made between individual people. In many cases, one or both parties will actually be groups of people, such as companies, local authorities and other organisations. Such groups are generally called corporations, and the contracting capacity of a corporation depends on what type of corporation it is.

MINORS.

Traditionally, anyone under 21 was regarded by the law as a minor (in fact the law usually called such people ‘infants’). Their ability to make contracts was first limited by the common law, and then by the Infants Relief Act 1874, which introduced rather complicated provisions on the subject. In 1969, the Family Law Reform Act reduced the age of majority to 18, and replaced the term ‘infant’ with ‘minor’, and then in 1987, the Minors’ Contracts Act repealed the Infants Relief Act 1874, and restored the common law, which still governs contracts made by minors today. The basic common law rule is that contracts do not bind minors. There are, however, some types of contract which are binding on minors, or which are merely voidable. The only contracts which are binding on a minor are contracts for the supply of necessaries. ‘Necessaries’ are interpreted as including not just the supply of necessary goods and services, but also contracts of service for the minor’s benefit. Necessaries are those things that are normal and usual to the minor. They are not luxuries. More so, where there is a binding contract for necessaries, the minor is only bound to pay a reasonable price for them, which need not be the contract price cf; Labinjo V Abake.

Furthermore, Minors are also bound by contracts of service, provided they are beneficial to them. In practice this generally means contracts of employment under which a minor gains some training, experience or instruction for an occupation – an apprentice- ship would be a common example. In Clements v London and North Western Railway Co, a minor made an agreement under which he gave up his statutory right to personal injury benefit, but gained rights under an insurance scheme to which
his employers would contribute. [It was held that the rights gained were more beneficial than those given up, and so the contract was, on balance, for the minor’s benefit and therefore binding]. However, the contrary would be the case where it is obvious that the benefits tills towards the other party. See De Francesco v Barnum where a 14-year-old girl entered into a stage-dancing apprenticeship with De Francesco, under an agreement which was considerably more favourable to De Francesco than to the girl. She was not to marry during the seven years of the apprenticeship, could not take on professional engagements without his written consent and was completely subject to De Francesco’s commands. He, on the other hand, made no commitment to employ her, and stated that if he did do so it would be at a very low rate of pay. The agreement also allowed him to send her abroad, and to put an end to the agreement at any time. Fry LJ concluded: “Those are stipulations of an extraordinary and unusual character, which throw, or appear to throw, an inordinate power into the hands of the master without any correlative obligation.” Consequently, [the court held that the contract was not for the minor’s benefit, and could not therefore be enforced against her].

AVAILABLE REMEDY

Clearly the rules on minors and contracts have the potential to create injustice – for example, where an adult is unaware that the other party to a contract is a minor. Consequently, the equitable remedy of restitution, which is used to make anyone who has been unjustly enriched give back their profit, has been applied to minors. If a minor fraudulently obtains goods and then keeps them, an order for restitution can be made to make the minor give them back to the claimant. In practice, this equitable remedy has become less important in the light of the power granted by s. 3 of the Minors’ Contracts Act 1987. Under this Act, where an adult has entered into an unenforceable contract with a minor, or a contract which the minor has terminated, the courts may give any property acquired by the minor under the contract back to the adult, provided it is ‘just and equitable’ to do so. This provision goes further than the equitable remedy, in that it may be used even if the minor has not acted fraudulently. A young person who has already sold or exchanged the property may have to pay the cost of the goods, or
give up any property received in exchange for them. However, a minor who no longer has the goods or any proceeds of their sale or exchange cannot be made to pay anything, as this would effectively enforce what is still an un-enforceable agreement. The equitable remedy of specific performance can never be used against a minor, nor can it be used by a minor, because the remedy requires mutuality between the parties. If an adult realises that they are making a contract with a minor, they may ask for a guarantee from an adult. Under s. 2 of the Minors’ Contracts Act 1987, where a contract is unenforceable because it was made with a minor, a guarantee of that contract will be enforceable. Thus, the adult who provided that guarantee will have to compensate the other contracting party for their loss according to the terms of the guarantee. This arrangement is frequently used where loans are made to minors. NB. Minors would become liable in tort if they understand fully well the things they are engaging in.

**MENTAL INCAPACITY:**

This category covers people suffering from mental disability which include both (mental illness and mental handicap), and those who are drunk when the contract is made. In general, contracts made with someone in either state will be valid, unless, at the time when the contract is made, that person is incapable of understanding the nature of the transaction and the other party knows this. In such circumstances the contract is voidable: the party suffering from mental disability or drunkenness can choose whether or not to terminate it. However, where one party is incapable, through drunkenness or mental disability and cannot understand the nature of the transaction, and the other party equally does not realise this, the courts will ignore the incapacity. In Hart v O’Connor, [the Privy Council held that a person of unsound mind was bound by his agreement to sell some land because, when the contract was made, the buyer did not realise that the seller had any mental incapacity]. ”

The fact that a person has a poor understanding of the language in which the contract was made and is an illiterate does not render them incapable of making a contract. Thus, the defendant in Barclays Bank v Schwartz, 1995 was Romanian and had signed
contracts rendering him liable for his company’s debts of over £500,000. In an attempt to resist paying the money he argued that his poor English and illiteracy meant he lacked the capacity to make the contracts. [This argument was rejected by the Court of Appeal, being described by the court as ‘straight from the book of feeble excuses’. A person who was illiterate, or did not understand the language of a contract, was aware of this, and the obligation was on them to make sure that the contract was explained].

End of note &

Success in your examination, cheers.