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Tony Cunningham

Technological University Dublin, tony.cunningham@tudublin.ie

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AN INTRODUCTION TO BUILDING CONTRACTS: AN IRISH CONTEXT

Tony Cunningham
School of Surveying and Construction Management
Dublin Institute of Technology, Bolton Street, Dublin 1

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Introduction

A contract is an agreement which is capable of being enforced at law and whose essential characteristic is that of a bargain. Contract law focuses predominantly on commercial transactions and in the construction context these range from simple every-day transactions such as purchasing a box of nails to procuring multi-million euro building facilities. In Ireland construction clients typically engage designers and quantity surveyors to formulate designs and they subsequently contract with building contractors to construct the designs. The contractors, in turn, typically outsource much of the work to subcontractors and order materials from numerous suppliers. All of these activities involve contractual relationships and each of the participants is linked to others within the supply chain by means of a contract.

In Ireland, contract law forms part of the ‘*common law*’ system. A key characteristic of this system is the principle of *judicial precedent*, whereby courts base their decisions on previous rulings relating to similar cases. Judicial precedent serves to establish a consistent approach to resolving disputes. Precedent applies unless the particular facts and legal principles of the case can be distinguished from those underpinning the apparent precedent or ‘leading’ case.

A contract has been defined by Keenan (2012) as *an agreement, enforceable at law between two or more parties whereby rights are acquired by one or more persons in return for certain acts or forbearances on the part of the other or others.*’

Contracts are voluntary agreements and the contracting parties are largely free to set their own terms and conditions. However this freedom may be curtailed by common or statute

law. Some of these restrictions seek to protect the perceived ‘weaker’ contracting party and/or prevent ‘dominant’ contracting parties from abusing contractual freedoms. For example, the Construction Contracts Act (2013) which took effect on 25th July 2016, seeks to improve construction administration practices by regulating payment procedures, providing remedies for non-payment, and prescribing resolution procedures in the event of disputes.

The Formation of a Contract

The Essential Ingredients of a Contract

There are a number of prerequisites that must be satisfied before a contract comes into existence. In essence, there must be (i) an *agreement* which is (ii) *intended to have legal effect* and is supported by (iii) *consideration*. In addition, certain contracts must be executed in a particular (iv) *form*. The agreement must be (v) *consensual*, (vi) *legal* and be *possible* to perform, finally, the parties must have the necessary (vii) *contractual capacity*. These factors are now outlined.

Agreement

An agreement comes about when the contracting parties arrive at a consensus (*ad idem*) on the details of the transaction that the law regards as essential. Keenan (2012) describes this juncture as ‘*when the words and the conduct of the parties are sufficient to lead a reasonable person to assume that they had reached agreement with respect to the same subject matter*’. Agreements comprise of two distinct components: offer, and acceptance. Agreements are formed when a proper offer is accepted without qualification by the other party.

As building contracts typically involve the expenditure of large sums of money, it is common practice for them to be entered into on the basis of a standard form of building contract. These publications formalise the basis of the agreement, set out the applicable terms and conditions and identify the rights and obligations of the contracting parties. In Ireland private sector building contracts are typically carried out under one of the suite of

the RIAI (Royal Institute of Architects in Ireland) contracts. Public sector building contracts employ one of the Public Works Contract Forms (PW-CF). Likewise, subcontracts often use standard forms of subcontract which, ideally, are compatible with the ‘parent’ main contract. The CIF (Construction Industry Federation) issues a number of standard forms of subcontract to facilitate these arrangements.

Offers

An offer may be viewed as a proposal.

Doolan (2011) explains that ‘*an offer exists where the party making the offer undertakes to be contractually bound, should a proper acceptance be made by the party to whom the offer is made.*’ An effective offer must be *communicated*, be *unequivocal* – i.e. be unconditional, clear and expresses its essential terms with certainty. The offer may be addressed to a particular individual, to a particular group, or to the general public and may be made in writing, or be verbal, or it may even be inferred from the parties’ conduct.

An offer terminates: on acceptance, or if it is rejected, or if a counter offer is made. Offers may be withdrawn before acceptance, provided the revocation is communicated to the offeree. Offers do not last indefinitely but they must be open long enough to allow the offeree to respond. They may have expiry dates, otherwise they lapse after a ‘reasonable’ period. The offer may also expire if a particular pre-condition fails to materialise. Finally, offers often expire if the offeror or offeree dies (Keenan, 2012).

Doolan’s definition above emphasises the requirement that offer must be intended to become binding when accepted. There are a number of situations in which individuals may mistakenly believe that an offer has been made to them, but which are not considered to be valid legal offers. Keenan (2012) identifies these as: answering questions and/or supplying price information; invitations to treat; statements of intention, and option arrangements.

Offers must be distinguished from ‘*invitations to treat*’ which represent a point in the negotiations where one party is invited to make an offer. Invitations to treat can closely

resemble offers and many people have mistaken them for genuine offers. So, for example, displaying goods for sale, with or without prices, may lead prospective purchasers to think that the vendor has made an offer and must sell the goods at the displayed or listed prices. This is not the case, - in these situations it is the purchaser who makes the offer, which in turn, may (or may not) be accepted by the vendor. Other categories of invitations to treat include advertisements, including those in catalogues and brochures, TV and radio. Even if the word 'offer' is used, the advertisement is still generally regarded as an invitation to treat. Other categories include share issue prospectuses, and particular aspects of auction sales.

Regarding construction contracts, a *tender* is a term used to describe a contractor's offer to construct the works. It is common practice for clients to issue invitations to tender to contractors in order to obtain prices for the work. Such invitations are no more than a starting point in the negotiation process. The client is *generally* under no obligation to accept the lowest or, indeed, any tender. The tender documentation supporting the invitation typically shows the scope and detail of the work and often identifies the terms and conditions under which the contract will be executed (in the Preliminaries section of the Bill of Quantities for example) and may also contain other important information such as the length of time the tender will remain open for acceptance.

Regarding statements of intention, the general position is that if somebody states that he/she *intends* to do something, and subsequently does not, the other party gains no rights despite suffering loss. In this regard, construction contracts are commonly preceded by the issue of a letter of intent. Such letters¹ may, *or may not*, constitute a valid offer depending on the wording used. Keane (2001) comments:

It is common practice for some projects to start on this basis, and indeed for some of them to be completed without any formal contract ever having been signed. This can cause great difficulties and it is suggested that if a letter of intent is issued that several basic points be referred to. A court will often infer the existence of a

¹ The topic of letters of intent introduces a complex area of discussion as to whether an agreement has been reached. Readers are referred to pages 135 and 136 of Hughes, W. Champion, R. and Murdoch, J. (2015) *Construction Contracts Law and Management* 5th ed. for a detailed discussion on this topic.

contract in the absence of a concluded agreement but it would be prudent for the letter of intent to refer to the proposed contract form, the tender sum, the basis of payment, and the time for completion. It would also be sensible to suggest a limit to the amount that might be paid under a letter of intent. (p.180)

If it is intended to allow work to start or materials to be ordered, the letter of intent should include a commitment to pay for any authorised work or expenditure by the contractor. In effect this would form a separate ‘collateral’ contract. Letters of intent should therefore be treated with caution.

Conditional offers, for example those being conditional on the approval of a planning application or the availability of finance (referred to as ‘conditions precedent’) are not valid offers, unless and until, the particular conditions are satisfied.

Acceptance

Hughes, Champion and Murdoch (2015) state that ‘*The acid test* [of a valid offer] is *whether the other party can bring about a contract by merely replying ‘yes’*. A valid offer establishes a binding contract when it is unconditionally accepted by the other party. Usually, there is little difficulty in deciding whether an offer has been accepted, nevertheless there are various requirements which must be satisfied in order to constitute a valid acceptance.

The acceptance must mirror the offer – it must be certain, unambiguous and *unequivocal*. Acceptance must be *communicated* by the offeree to the offeror and may be verbal, be in writing, or may be implied from conduct. The offeror cannot stipulate, without the offeree’s consent, that silence or inactivity shall constitute acceptance. The requirement to communicate acceptance is, however, subject to two exceptions: (a) so-called ‘*unilateral*’ contracts, where acceptance is deemed to occur when the offeree performs a prescribed act, and (b) the ‘*postal rule*’, where the communication of acceptance is deemed to take effect when it is posted or transmitted, despite the delivery being delayed or becoming ‘lost in the post’. The offeror may specify a particular means of communicating acceptance, but unless this is prescribed as the only form of acceptance,

the offeree may accept by another method, provided the offeror suffers no disadvantage. Acceptance is not effective if communicated in ignorance of the offer.

A purported acceptance that does not mirror the offer becomes a counter-offer, which terminates the original offer, but which may, in turn, become a contract if accepted by the original offeror. Apparent ‘agreements’ using the expression ‘subject to contract’ generally indicates that a binding offer and/or acceptance does not exist at that point.

Questions may arise, nevertheless, as to when, or whether, an agreement has taken place, particularly in situations involving extended negotiations or a long exchange of letters, each of which attempts to clarify or improve the particular party’s position². For example, during contractor and sub-contractor/supplier negotiations, the parties often seek to contract on their own respective standard terms of business. It may be difficult to establish whose terms, if any, prevail. Each case must be judged on the particular facts. However, where work has actually been carried out, a court may decide that the last letter prevails on the basis that its terms have been accepted by the other parties’ conduct. Nevertheless, the facts may show that an earlier contract has been established and the effect of later negotiations can be ignored (Hughes et al. 2015).

Keane (2002) advises employers and contractors, to resist making changes to the original terms contained in the invitation to tender. He suggests that where alternative proposals are advanced that these should ‘*always be done by way of supplemental prices or conditions, so that the original terms of the contract are identifiable.*’ He stresses that this is fundamentally important in ensuring that the contracting parties are certain of the contract’s details and intention.

Intention to be Legally Bound.

An enforceable contract does not arise unless both parties intend their agreement to have legal effect. Doolan (2011) explains that promising a friend a lift to a football match is

² These circumstances are often referred to as the ‘battle of the forms’ – See *Butler Machine Tool v. Ex-Cell-O Corp* [1979] 1 All E.R. 965 (C.A.)

hardly meant to be a binding contract, however, giving of a regular lifts to a workmate who contributes towards the petrol expenses, is probably a binding contract. He distinguishes ‘commercial contracts’ from ‘social contracts’, noting that the former are more likely to be enforced. He explains that business agreements are normally presumed to include the intention to be legally bound, whereas the parties to social arrangements rarely intend to be legally bound unless this can be rebutted by evidence to the contrary.

As noted above where expressions such as ‘subject to contract’, ‘agreement in principal’, ‘provisional agreement’ or ‘binding in honour only’ are used, this usually indicates that there is no intention to be legally bound at that point (Keenan, 2012).

Consideration

Keane (2002) notes that while all contracts are agreements not all agreements are contracts; an agreement to meet someone is not a contract. Contracts, fundamentally, are bargains and the ingredient that converts an agreement into an enforceable contract is an element called *consideration*. Consideration has been defined as “*some right, interest, profit or benefit accruing to one party, or some forbearance, detriment, loss or responsibility given, suffered or undertaken by the other*”³. Consideration requires each of the contracting parties to bring something to the table, and in this process each party gains a benefit and simultaneously suffers some form of loss. This transaction may be viewed as a *quid pro quo* and most commonly takes the form of payment for goods, work, and/or services. In the construction context this translates as the contractor agreeing to build and the employer agreeing to pay.

Courts, as a general rule, do not enforce promises unless they are supported by valid consideration and proving that no consideration has been provided by the plaintiff is a complete defence in contractual actions. The exception to this general rule is where the contract is entered into in the form of a deed (see below). Deeds of covenant are a well-known example of this type of arrangement.

³*Currie v. Misa* [1875] LR 10 Ex 153; (1875-76) LR 1 App Cas 554.

Keane (2002) comments that, in practice, consideration causes few problems in building contracts, noting that contractors only very rarely perform the work for a consideration other than money. Nevertheless, there are a number of principles governing the operation of contractual consideration. Consideration must be *sufficient* (i.e. be of some legal value) but it *need not be adequate*. It must *not be illegal, vague, or impossible* to perform, and must be something which the parties are *not already legally or contractually required to do*.

Consideration can be in any form that *has a legal value*. Anything of value which contributes to the bargain constitutes good consideration - a peppercorn can be good consideration⁴. A promise to forego something that one is entitled to is also good consideration. The value of the consideration itself is irrelevant, and, to an objective observer it may seem to be totally out of proportion to the benefit being acquired. The courts *will* enforce a one-sided deal and will not, as a general rule, protect parties who make bad bargains. The performance of an existing legal or contractual duty is not considered to be sufficient consideration, as it does not bring any additional benefit or loss to the bargain. However, if some additional service is provided this will qualify as sufficient consideration.

Previous favours, benefits and/or detriments which have passed between the parties before the prospective agreement is finalised are referred to as *past consideration* and, as a general rule, are not regarded as sufficient to enforce the contract. Again, one of the parties is receiving nothing new in exchange for their contribution since they already have it. Past consideration may, however, support bills of exchange (such as cheques), and may also support a later promise to pay for something done in relation to the promisor's earlier request.

⁴*Chappell & Co Ltd v Nestle Co Ltd*. [1960] AC 87), stated that a "peppercorn does not cease to be good consideration if it is established that the promisee does not like pepper and will throw away the corn". Keane (2002) reports the case of *O'Neill v Murphy* [1936] NI 16 which ruled that the offering of prayers was insufficient consideration.

New or additional consideration must, in general⁵, be provided to enforce the waiving of a contractual obligation. Exceptions to this general rule occur where the parties agree to discharge an original obligation (often the payment of the full debt) by accepting: (a) a lesser amount before the due date; (b) a consideration of a different nature, for example, goods, instead of payment; (c) part payment by a third party; (d) part payment to a group of creditors, or, (e) if the principle of '*promissory estoppel*' applies. Promissory estoppel arises in situations where the promisee relies on, and acts upon, a promise given by the promisor that an obligation (usually a debt) will be waived or not enforced in full. In these situations the promisor is estopped (prevented) from retracting their promise.

Consideration must move from the promisee. In general, a person cannot sue in contract unless some consideration has been either given, or promised, to the other party. This principle forms the basis of the doctrine of '*privity of contract*'. A person not contributing to the consideration is not 'privity' to the contract and consequently, has no enforceable rights or obligations under it. So, in construction contracts, a domestic sub-contractor who is owed money by the main contractor cannot, in general, sue the building owner, as this category of subcontractor typically does not have a direct contract with the employer.

Form of a Contract

As a general rule, contracts are not required to be in writing.

Doolan (2011) observes that there is a common misconception that a contract cannot be enforced unless it is in writing. He adds that a contract may take any form unless statute law requires a particular special form to be used. As noted above, a contract may be in writing; it may be verbal; or it may be inferred from conduct, indeed, it may include two, or all, of these elements. Doolan comments that everyday 'typical' purchases are normally verbal; self-service purchases arrangements may be inferred by conduct, however, hire-purchase agreements *must* be in writing. He notes that the more valuable

⁵ Note the complications introduced in the case of *Williams v. Roffey Bros.* [1991] 1 QB 1.

the contract is, the greater the likelihood is that it will be in writing. Nevertheless, he reminds us that that a verbal contract is equally as binding in law as a written one.

In a limited number of cases, however, statute law requires a degree of formality in order to enforce the contract. Particular contracts must be made in the form of *a deed* (also referred to as being made under seal), others must be *in writing*, while others must be *evidenced in writing*. These requirements provide clearer evidence of the terms and may help to reduce potential disputes and ease their resolution (Doolan, 2011).

A *deed* is a legal instrument in writing which passes, affirms or confirms an interest, right, or property and that is signed, attested and delivered. It is commonly associated with transferring title to property. Some contracts, such as those unsupported by consideration, or the promise of a gift, or those involving the sale of land or premises must be in the form of a deed. All contracts may be executed by deed but in practice few everyday contracts are. Substantial building contracts, however, due to their size and complexity are often executed as a deed as this formality provides a liability limitation period of double that of a simple contract; deeds may be sued upon for twelve years rather than six years in the case of simple contracts (see the comments regarding the Statute of Limitations below).

Some contracts must be in writing in order to be valid. Examples are bills of exchange and promissory notes, transfers of company shares, and hire purchase/credit agreements.

Certain contracts do not have to be in writing, but need only to be evidenced in writing by a written and signed memorandum or note. For example contracts of guarantee and contracts relating to the sale of land or any interest in land must be evidenced in writing⁶. The memorandum or note must identify the contracting parties, the subject matter and/or the terms of the agreement, and the consideration provided.

Although construction contracts can be made by word of mouth or by conduct, it may be difficult to prove what has been agreed unless a written record has been kept. It is

possible to write a ‘bespoke’ contract, however this process is likely to be both time consuming and expensive. A number of standard forms have been published in order to provide a convenient ‘ready-made’ solution to the task of drafting construction contract terms. These regulate how the contract is to be administered and how the main risks inherent in the construction process are to be allocated between the contracting parties. Using standard forms of contract provide greater clarity in the event of disputes.

Consensual

‘I made him an offer he couldn’t refuse’. (Mario Puzo)

It is presumed in law that any agreement between contracting parties is made voluntarily. Consequently, if an agreement is brought about by duress (threatened or actual violence) or undue influence (pressure without threat), these will undermine the agreement making the contract voidable (see contracts which are not binding below).

Legal and Possible

The law refuses to give effect to a contract for an illegal purpose, or for a purpose which is contrary to public policy. The contract must not be for an illegal objective, or be tainted by illegality by, for instance, building in contravention of the planning laws. The object of the contract must also be capable of performance.

Capacity

A general principle of contract law is that adults of sound mind have full contractual capacity to enter into binding contracts. Particular rules, however, apply to minors, corporations, mental patients and drunks. These persons have restricted capacity to contract and contracts made by them may be valid, voidable or void.

⁶ Required by the Statute of Frauds (Ireland) Act 1695.

Minors are persons who are under eighteen years of age. Building contracts involving minors are unusual but are possible. Minors can enter into binding contracts for necessary goods and services (*necessaries*), and they may enter into beneficial contracts of employment or apprenticeship. *Necessaries*, are goods *suitable* to the condition in life of the particular minor and to his/her actual *requirements* at that time.

Corporations and companies are limited by their memoranda of association to entering only certain types of contracts. If they make contracts outside these limits the contracts are said to be *ultra vires* (beyond their powers) and void. (Keenan, 2012)

If a person is insane or intoxicated when entering into a contract, the contract is voidable if it can be shown that: the person was at the time incapable of understanding the nature of the contract; and the other party knew, or ought to have known, of this disability. The burden of proof is on the party suffering from the incapacity to prove the knowledge of the other party. A contract made by a drunk or person of unsound mind may, however, be ratified on recovery to a sober or lucid state, and thereby become completely valid (Keenan, 2012).

Terms of the Contract

Keenan (2012) and Doolan (2011) describe the contents of a contract as its *terms*. These define the rights, obligations and rules underpinning the agreement and such terms may be express and/or implied.

Express Terms

Express terms and conditions are the statements that have been mutually agreed during the pre-contract negotiations. Express statements typically cover the primary aspects of the agreement and are intended to have legal effect. Nevertheless, not everything said by the parties during negotiations is intended to be legally binding. Statements such as ‘it’s a great bargain’ or ‘only an hour from Dublin’ encourage the parties to contract but are too vague or are not intended to be binding, such statements are referred to as ‘*representations*’ - often prefixed by the somewhat condescending adjective ‘mere’.

Statements are more likely to be considered to be terms rather than mere representations where they are: precise or emphatic, or are based on expert knowledge, or are made during the concluding phase of the negotiations, or where the agreement is not reduced to writing.

Implied Terms

Nevertheless, pre-contractual discussions are rarely exhaustive and the negotiating parties may overlook secondary or less important aspects of the agreement. In these instances courts will *imply* terms to give effect to the presumed intentions of the parties. These often relate to the customary industry practice. Terms may also be implied to give effect to statutory requirements such as the *Construction Contracts Act (2013)*, the *Sale of Goods and Supply of Services Act (1980)* and the *EC (Unfair Terms in Consumer Contracts) Regulations* as well as current planning, building control, health and safety and environmental legislation. Similarly terms may be implied in order to make the contract workable - to give it business efficacy. Terms, however, will *not* be implied to make a contract more reasonable or which are inconsistent with the express terms.

Conditions and Warranties

Contract terms have traditionally been categorised as ‘conditions’ and ‘warranties’. Conditions are fundamental and go to the heart of the contract and breach of a condition by one party allows the injured party to repudiate the contract and sue for damages. Warranties, on the other hand, describe secondary contractual concerns that are not, in themselves, fundamental to the contract. Breach of a warranty does not give the right to repudiate the contract, but it does give the right to seek damages. Many standard form contracts contain extensive so-called ‘conditions of contract’ many of which, however, are, in effect, warranties.

Contract Documentation

The terms of building contracts are contained in the contract documents. These documents typically comprise drawings, specifications and/or bills of quantities or

schedules of rates which identify the scope and detail of the project and statements and/or documentation relating to the nature of the agreement. On substantial, and indeed on many smaller projects, standard forms of contract are used as a convenient means of documenting the terms of the agreement. Standard forms typically prescribe normal industry procedure and cater for difficulties which may arise from time to time on construction projects. Standard form contracts are often drafted by tribunals representing a broad spectrum of stakeholder interests and are widely perceived as providing a balanced approach to allocating risk between the contracting parties. One of their main advantages is that they reduce areas of uncertainty between the contracting parties and consequently, disputes where courts may otherwise need to imply terms.

The PW-CF1 contract provides a useful example of the issues commonly addressed within standard forms of building contract. These include: contract matters and definitions; the law governing the contract; insurance arrangements; management procedures; the contractor's personnel; property issues; site, quality, programme, and cost issues; payment arrangements; termination procedures and dispute resolution arrangements.

Many building contracts contain exemption/exclusion clauses which seek to exempt or limit one of the parties from liability which might arise out of the performance or non-performance of the contract. The general rule regarding liability in these situations is well expressed by the cliché 'sign and be damned'. If a contract is to be signed, the parties become bound by its terms, (in the absence of misrepresentation), even if they do not read or understand them. Where a contract is not in writing and one party proposes to incorporate an exclusion clause, the exemption will only apply if the other party knows of the clause or if the proposer has taken reasonable measures to bring the exclusion clause to the other party's notice before the contract is made.

A contracting party cannot unilaterally change the original terms nor introduce new terms into the contract after it has been entered into. This principle has significant implications for construction contracts, as design development and detailed fine-tuning modifications inevitably occur during the post-contract construction phase. Consequently, standard

form contracts provide mechanisms which permit the issuing of variation and change orders. This facility enables clients and design teams to introduce better or more suitable design solutions, or to take corrective action in response to unexpected events. Variations, however, usually lead to changes in the original contract sum. Keane (2002) comments that a variation must not undermine the certainty of the original contract. He states: *'this means that both parties must be of one mind, and must intend the same outcome. For example an Architect, despite his wide powers under the contract, cannot order a variation of the kind that would not have been contemplated by the Contractor when making his tender bid.'*

Doolan (2011) explains that where a contract is reduced to writing, the *general* rule is that further 'extrinsic' oral or written ('parol') evidence will not be admitted to vary the terms of the written contract. He supports this position, arguing that the parties should normally be bound by the writing alone. He notes however that the strict application of this rule would lead to injustice in particular cases and explains that extrinsic evidence may be admitted to *'explain the subject matter of the contract'* or *'where the written document is not the entire contract'* for example where evidence of telephone conversations could be added to the written terms to form one contract.

Contracts which are not Binding

There are a number of circumstances, which can end an otherwise valid contractual relationship. These are if a contract is *void*, *voidable* or *unenforceable* (Keane, 2001). In these situations one or both parties may be unable to enforce their agreement. These situations occur most often where one or both parties make a mistake of fact; and/or where a contract induced by misrepresentation. Contracts may also be non-binding where the essential elements for the formation of a contract noted above are absent, for example, where illegality is involved, or one of the parties does not have full capacity to contract.

Void Contracts

If a contract is void there is no contract in law at all. Keenan (2012) describes void contracts as *'agreement(s) without legal effect'*. These may arise in situations where the

parties have attempted to contract, but the law will not give effect to their agreement, because, for example, there is a *common mistake* on some major term, or the contract has been entered into by a minor for the supply of goods other than necessities. Keane (2002) adds that building contracts involving illegality such as those where planning permission or bye-law approval has not been obtained or where *deliberate* contravention of any statute has occurred would render the contract void.

With regard to mistake, in general a mistake by one or both of the parties to a contract has no effect on its validity. However a contract may be void where the parties contract under a fundamental mistake of fact. Keane (2002) comments that the mistake must be a basic and fundamental mistake enough to destroy the certainty on which the contract was based e.g. – where the offer made by one party does not truly correspond to the acceptance by the other. He uses the word ‘misapprehension’ to describe situations which may render a contract void, stressing that the misapprehension must go to the root of the contract rather than some ‘*mere aspect of interpretation or performance*’. So, for example, in cases of mistaken identity or the (non) existence of the subject matter or fundamental state of affairs, where the parties negotiate at cross purposes may render a contract void. However, under-priced rates or arithmetical errors in bills of quantities are not considered sufficient mistakes to render a contract void.

The usual remedy in the case of void contracts is that of rescission. Doolan (2011) explains that:

The right to rescind is one in which a party to a transaction sometimes has to set that transaction aside and be restored to his or her former position. The purpose of rescission is to release the parties from the contract. A party rescinding a contract must be restored to the position prior to the contract. Therefore, property must be returned, possession given up and accounts taken of profits or deterioration (p.129).

Hughes et al (2015) note, however, that there are exceptions to this general principle. A mistake made by both parties, or known to one (who may acquiesce in the other’s mistake with the intention of snapping up an offer which clearly was not really intended) may form the grounds for rectification. Doolan (2011) describes this remedy as:

Where parties to a contract agree on terms and that agreement is reduced into written form, which either does not contain those agreed verbal terms or contains different terms to those agreed, the court may rectify the written document to conform to the terms verbally agreed. The court is concerned with defects in the recording of the contract and not in its making (p.129).

Voidable Contracts

A voidable contract provides one of the contracting parties with the option to terminate *or* to affirm the contract in certain limited circumstances. Most voidable building contracts arise because of misrepresentation, but under the general law of contract, contracts involving minors or those made under duress may also be voidable.

A misrepresentation is a *false statement of material fact* which misleads the innocent party, is relied upon, and induces the innocent into the contract. As noted above sales talk and ‘mere representations’ are not intended to be relied upon and therefore do not amount to misrepresentation. Keane (2002) and Keenan (2012) comment that the misrepresentation must be positive (i.e. expressed), and a fact, adding that a non-disclosure of a fact might not be sufficient ground to render a contract voidable, and misrepresentation of an opinion or an intention would form no ground for misrepresentation. Keenan adds that, in general, silence does not amount a misrepresentation unless circumstances relating to the contract change during the course of the negotiations, or a statement subsequently becomes false, or where silence distorts a literally true statement.

In the case of a voidable contract, the innocent party is entitled to treat the contract as being at an end, and to obtain damages. If the innocent party continues to perform his/her part of the contract after becoming aware of the misrepresentation he loses his right to rescind the contract.

Keenan (2012) explains that where one party transfers property to a third party before avoiding the contract, then such property is usually irrecoverable.

Unenforceable contracts.

An unenforceable contract is a contract, which will not be enforced by the courts because of the lack of legal evidence, e.g. the written evidence for the contract for the sale of land as required by the Statute of Frauds, has not been complied with.

If a contract is deemed to be unenforceable and either party refuses to perform or complete his/her part of the contract, the other party cannot compel it to do so. Any property transferred under an unenforceable contract cannot be recovered - even from the other party to the contract. Keane (2002 p.181) adds however, that this particular contract results in a situation where a positive action, such as claiming damages, cannot be taken but where passive action, such as making a defence, can be relied on ('a shield not a sword').

Discharge of the Contract

Discharge of contract refers to the various means by which a contract is brought to an end. There are a number of ways in which this may come about, a contract may be discharged: by *performance*, by *agreement*, by *notice*, by *operation of law*, by *frustration*, and by *breach*. (Doolan, 2011)

Discharge by Performance

The normal and non-contentious way of ending a contract is where the various parties duly perform their contractual obligations. In typical building contracts this occurs when the architect issues the final certificate, but the parties will have ongoing liabilities for a number of years afterwards. The duration of this period is governed by the Statute of Limitations (1957) whereby an action for breach of a 'simple' contract must be taken within six years of the cause of action; contracts under seal (deeds) are limited to twelve years, and actions for personal injury must be commenced within two years. Attempted actions beyond these periods are said to be 'statute barred' (Keane 2001).

The general rule on discharge by performance is that the performance must be exact and complete. This is sometimes referred to as the rule in *Cutter v Powell* which forms the

basis of arrangements referred to as ‘*entire contracts*⁷’ – whereby the obligations must be entirely performed by the contractor before there is a corresponding obligation of the employer to pay. If performance is not exactly as agreed, or if every part of the contract is not fully performed, the non-or-under-performing promisee cannot claim on the contract and the promisor may refuse carry out their part of bargain (i.e. pay). This outcome often appears to penalise the claimant while the recipient may enjoy significant benefits and not pay for them. The courts have therefore, developed a number of exceptions to the general rule in order to mitigate its severity and prevent unjust enrichment.

The principle of *acceptance of partial performance* applies where one party fails to fully complete his/her obligations, but the other *freely accepts* the partial benefits provided. In such cases the parties mutually accept the partial performance as satisfactory and courts will imply a promise to pay for the benefit received, thereby discharging the contract.

The doctrine of *substantial performance* as illustrated in the case of *Hoening v Isaacs*⁸ holds that if the contract has been substantially performed then it should be substantially paid for. Substantial performance means that the essential work has been done, and only a small proportion of the contract remains outstanding – for which an appropriate sum is deducted (retained) from the contract sum in order to complete or rectify the outstanding work. Substantial performance of building contracts is commonly documented by the issue of a contract administrator’s certificate of practical/substantial completion.

The principle of *partial performance* applies to divisible contracts which can be divided into parts, stages or instalments. Under these agreements payment becomes due upon completion of each part or instalment (Keenan, 2012). This arrangement is standard in building contracts which typically incorporate periodic (interim) or stage payment arrangements.

⁷ Chitty on Contracts (25th Edition 1983) defines an entire contract as one which requires "complete performance by one party as a condition precedent to the liability of another"

⁸ [1952] 2 All ER 176

Where completion of the contract is *prevented by the promisee*⁹ the promisor may sue to recover for the work that he/she has done. This claim is often valued on a *quantum meruit* basis (see remedies in contract below).

Discharge by Agreement

Discharge by agreement occurs where both parties agree to end the contract. A *waiver* discharges a contract which is wholly unperformed by both parties. In such cases the consideration is the exchange of promises not to enforce the contract.

Where a contract has been partially performed or has been wholly performed by one party only, a discharge must, in general, be supported by new consideration or must be in the form of a deed (Doolan, 2011). This means that in order to end a contract, the parties must use a second separate contract, for which new consideration is given¹⁰. Keenan (2012) describes such arrangements as *accord and satisfaction*, noting that such arrangements may involve a cancellation fee in lieu of full performance.

Novation refers to an agreement where the parties replace the original unperformed contract with a substitute contract regarding the same subject matter. So, an existing contract between X and Y may be replaced by a new one. Likewise, the contract may be novated to a third party (Z) if all the parties are agreeable, in which case it becomes a contract between X and Z. The new contract is the consideration for ending the old one. This arrangement sometimes occurs in design and build procurement where a building client initially engages a designer to develop his/her requirements to a stage where these can be finalised by the contractor. In these situations the designer's employment is transferred to the contractor typically with the objective of securing continuity of the designer's concepts and standards within the eventual contractor's proposals.

⁹ *Planche v Colburn* (1831)

¹⁰ in the absence of circumstances where the doctrine of promissory estoppel would apply

Discharge by Notice

Certain contracts, such as employment contracts and franchise arrangements are of a continuing nature and usually contain notice provisions under which the contract will be terminated. In the absence of express terms, contracts can be terminated by reasonable notice. (Doolan, 2011)

Keenan (2012) notes that the contract terms may also provide for termination in certain instances. For example clauses 33 and 34 of the RIAI contract and clause 12 of the PW-CF1 contract provide for termination in the event of serious contractor or employer default. Likewise, the contract may permit the parties to discharge the contracts for unforeseen eventualities¹¹ which might otherwise frustrate the contract (see below).

Discharge by Operation of Law

Doolan (2011) explains that the law provides that contracts are discharged in specific circumstances. For example they become statute-barred under the Statute of Limitations; death terminates contracts of personal service. Where contracts are merged with a 'higher order' such as where a written agreement replaces the original verbal one.

Discharge by Frustration

It was not what I promised to do' – Furst and Ramsay (2006) p.187

Frustration occurs whenever the law recognises that without default of either party, a contractual obligation has become incapable of being performed, because of some intervening illegality, or because the circumstances in which performance is called for would render it as something different from that which was undertaken by the contract. O'Flaherty J. in *Bates v Model Bakery Ltd* (1993).

A contract is frustrated when during its performance it *becomes* impossible to perform, due to an intervening event *outside* the control of both parties. Under this rule the courts imply a term reflecting the presumed intention that the contract should be terminated in

¹¹ These provisions are often referred to as *condition subsequent*, which may or may not subsequently arise.

those circumstances. A contract is not frustrated where the potentially frustrating event was foreseeable, or where the terms of the contract provided for the eventuality, or where the event was due to the actions or negligence of one of the parties themselves. If a contract can still be performed it is not frustrated, regardless of whether it is more expensive or more difficult to perform. (Doolan 2011 p.124).

Keenan (2012 p.163) explains that frustration may arise in situations where: the subject matter of the contract is destroyed; or an event upon which the contract depends does not occur, or where personal incapacity prevents the performance of a contract for personal services, or where government intervention renders further performance of the contract illegal. Uff (1985) comments that examples of building contracts being frustrated are very rare, but notes that frustration was constituted where a building in which one party was to carry out work for the other was accidentally destroyed by fire.

Clarke (2004) comments that if a contract becomes frustrated then all future obligations are discharged. Keenan (2012) comments:

When a contract is discharged by frustration, the parties may recover payments made under the terms of the contract to the extent that there has been a total failure of consideration. If either party has received a valuable benefit (other than money) under the contract, prior to it being discharged, the court may order them to pay all or part of that value to the other party (Keenan, 2012 p.165).

Discharge by Breach

Doolan (2011) explains that a contract may be discharged where one party accepts the failure or the refusal, without justification, of the other party to perform its primary contractual obligations. He notes that the breach must be sufficiently serious and fundamental to the purpose of the contract in order to justify the repudiation of the contract: - the breach must relate to a term classified as a *condition* of the contract rather than a warranty. Breach of a warranty does not entitle the wronged party to treat the contract as discharged. Keenan (2012 p.116/7) notes that a breach of condition gives the innocent party the option of rescinding the contract and suing for damages. Alternatively he/she may elect to continue with the contract and seek damages. Doolan notes that such breaches of a condition may occur even before its performance is due to commence

(termed an ‘anticipatory breach’). Where the breach is a breach of warranty the innocent party may sue for damages only.

In construction contracts the primary obligations of the parties are for the contractor to build and the employer to pay. Uff (1985) is of the opinion that other examples of fundamental breaches of a building contracts might arise if a house is built without foundations or where a contractor refuses to carry out instructions to rectify defective work. Keane (2002) comments that the standard forms of contract provide for various circumstances which typically relate to serious breaches of contract, which entitles one party to the contract to discharge it. For example Clause 33 of the RIAI Contract provides for a process is called ‘determining the employment of the contractor’. It is defined that way because the contract itself is not ended, but the employment of contractor is ended. The contract remains in being to deal with the tidying up process after determination. Similarly, Clause 34 of the RIAI Contract provides for circumstances where the contractor may discharge his own employment if the employer is in serious breach of contract.

Remedies for Breach of Contract

Where a contract is breached, the innocent party has the right to seek a contractual remedy. In the vast majority of cases the remedy will take the form of monetary damages. In particular cases, however, remedies deriving from equity may be applied at the discretion of the courts to resolve cases where monetary compensation would not provide an appropriate remedy. These are outlined below.

Damages

Damages may be described as the payment of money to compensate for losses incurred following the breach of a contract. The underlying principle of contractual damages have been stated as ‘*Where a party sustains a loss by reason of a breach of contract, he is, so*

*far as money can do it, to be placed in the same situation with regard to damages as if the contract had been performed*¹².' (Furst and Ramsay (2004) p.260.)

According to Keenan (2012) every breach of contract gives rise to an action for damages. Where there is a breach of a *warranty*, but the injured party sustains no loss, he/she will receive only *nominal damages* in order to acknowledge that their legal rights have been infringed. However where breach causes actual loss; *substantial damages* are awarded as compensation. In particular isolated cases *exemplary damages* which exceed the actual monetary loss suffered by the injured party may be awarded against the party causing the breach in order to prevent him/her profiting from their breach despite paying damages. Exemplary damages may also be awarded in order to deter the general public from acting in a similar manner to the breaching party. In cases of serious breach (breach of condition) the injured party has the option of regarding the contract as being discharged (see above) or alternatively he/she may elect to regard the breach as a breach of warranty, and claim damages and continue with the contract. Keenan adds that '*if the injured party opts for a discharge of contract, they will be unable to take an action for damages, but will be able to sue for reasonable expenses incurred prior to the date of breach of the condition*' (p. 151).

Damages are often classified as being either *liquidated* or *unliquidated*.

Liquidated Damages

Liquidated damages, also known as liquidated and ascertained damages (LAD), refers to an arrangement whereby the contracting parties agree *in advance* to an amount, or to a mechanism for calculating an amount which may become payable in the event of a breach of contract. The approach is very common in building contracts and all the principal Irish standard forms of building contracts contain liquidated and ascertained damages provisions to cover situations where the contractor is at fault for failing to

¹² Robinson v Harman (1848) 1 Ex 850

complete the works on time. These clauses are seen as beneficial as they usually save time and effort for the parties in having to prove their actual loss in court.

The amount stated as liquidated damages must be a *genuine pre-estimate of the probable loss* that might result from the particular breach. A genuine pre-estimate of loss will be upheld by the courts because it would probably be a similar amount to that which the courts would otherwise award. When this sum is fixed nothing more can be recovered regardless of the amount of loss actually arising from the breach.

The courts, however, will not uphold a sum which is considered to have the nature of a *penalty* i.e. a sum which is '*extravagant and unconscionable in amount in comparison with the greatest loss that could conceivably be proved to have followed from the breach*¹³' (Furst and Ramsay, 2004 p.314). It is not uncommon for parties with the stronger bargaining power to attempt to incorporate a penal liquidated damages clause which is intended to operate as a threat to secure performance. This tactic is contrary to the general rule that damages are to compensate losses only. Where a court holds that the liquidated damages are, in fact, a penalty they will not enforce the clause. Keenan (2012) reports the following as instances which have been held to be penalties: instances where a single sum which is stated as compensation for a variety of breaches, and cases where a specified sum was greater than the money debt due under the contract.

Unliquidated Damages

These damages take the form of court awards where the plaintiff must prove his/her losses.

Where a contract makes no provision for the quantification of damages in the event of a breach, the injured party will sue for *unliquidated damages*. Where the action is successful the court will award a sum to compensate for the *reasonably foreseeable* losses suffered by the injured party. Keenan (2012 p.152) explaining the rule in *Hadley v*

¹³ Dunlop Pneumatic Tyre Co. v New Garage and Motor Co [1915] AC 79.

Baxendale states that damages may be awarded ‘for losses financial and non-financial, resulting naturally from the breach of contract, **or** which may reasonably have been in the minds of the parties on making the contract, as likely to result from a failure to complete the contract.’ The judgement in *Hadley and Baxendale* however set limits on the extent to which a defaulting party became liable for damages. This limit is referred to as *remoteness of damage* and holds that the damages must ‘be reasonably be supposed to have been in the contemplation of’ the parties (i.e. reasonably foreseeable) at the time of entering into the contract. The innocent party must, nevertheless, take reasonable steps to mitigate or reduce their losses, and prevent a further deterioration of the situation.

The measure of damages awarded is usually the actual monetary loss. Keenan (2012 p.152) explains that this amount is assessed as a ‘reasonable and fair estimate of the injured party’s loss,’ which is often arrived at ‘by a comparison with market prices’. She adds that compensation includes normal loss of profits and incidental expenses arising from the breach. She stresses however, that special or unspecified profits are excluded on the grounds of being too remote. Finally, she explains that the claimant may be entitled to damages ‘for physical inconvenience, such as loss of enjoyment or mental distress’.

Contractors’ claims for damages on building contracts may comprise the additional cost of prolonging the contract (often referred to as additional preliminaries), additional expense incurred as a result of disrupted construction operations, and where proven, additional head office overheads and interest on finance charges. Loss of profit due to due to the inability to take on other work of may also be awarded if this was foreseeable or likely when agreeing the contract.

Uff (1985 p.87) discusses the consequences of contractors’ breaches. He explains that the quantum of damages for defective work is ‘actual or estimated costs of reinstatement’ and that the extra cost of completing the project by others ‘at the earliest reasonable time’ will be awarded where the contractor fails to complete the work. He adds that matters such as loss of rent or profits ‘depend on the rules of remoteness’ discussed above.

Quantum Meruit

Doolan (2011) explains that a quantum meruit action is used to claim reasonable remuneration for what the work is worth or deserves ('merits'). He notes that quantum meruit actions are based on the promise, '*express or implied*', to pay for the work or service which has been provided. He distinguishes quantum meruit from claims for damages stating that '*the former is a claim for reasonable remuneration, whereas the latter is a claim for compensation*'.

Keenan (2012) notes that where a contract is discharged because of breach by one of the parties, the injured party may claim on Quantum Meruit in restitution for the work done, as an alternative to damages. She adds that if the contract '*is unenforceable because either it was only partially completed by the plaintiff, or because it did not comply with the Statute of Frauds, but the defendant accepted the work done, a claim may be made on Quantum Meruit*'.

It can be used where the contract has not provided for how much is to be paid, or where one party is prevented from performing their side of the contract.

In the construction context Hughes et al (2015) explain that a quantum meruit claim is one where '*the contractor seeks payment of the reasonable value of the work done for the employer.*' They note that quantum meruit claims arise in a number of circumstances, not all of which are employers' breaches of contract. They note that the absence of a '*contractual entitlement to payment or no contractual assessment of the amount due*' is a common link in these actions. They observe that quantum meruit actions may arise:

1. 'Where there is an express undertaking by the employer to pay a reasonable sum in return for services rendered.
2. Where professional or trade services are requested by the employer (for example under a letter of intent) but no price is agreed. Here it is implied that a reasonable sum will be payable.
3. Where a price fixing clause in a contract fails to operate.

4. Where extra work is ordered which falls outside the scope of the variations clause.
5. Where an apparent contract under which work is done is in fact void.’ (p.341)

Action for the price.

Doolan (2011) explains that an action for the price ‘*is used where one party has failed to pay the contract price and the other seeking payment of the price but not any additional damages*’. He adds that it is a common remedy for breaches of the Sale of Goods Acts.

Equitable Remedies

Building contracts essentially involve paying for materials and work. Breaches of building contracts by employers often involve their failure to pay as agreed, or through actions or omissions which delay and/or disrupt the contractor’s organisation thereby causing it loss and/or additional expense. Breaches by contractors typically relate to failing to complete on time or failing to achieve the specified quality standards causing the employer loss and/or expense. Breaches of contract, therefore, have cost implications. It follows that monetary damages will be the most appropriate and effective remedy in the vast majority of building contracts.

In unusual, circumstances, or in the wider context of contract law, monetary compensation may not be the most appropriate remedy and in these instances equitable remedies may be sought. Equitable remedies seek to provide a fair resolution to the dispute rather than provide monetary compensation. Among the most common equitable remedies are rescission and rectification both of which have been outlined above in relation to ‘defective’ contracts. Specific performance and/or injunctions may be appropriate in particular cases.

Specific performance directs a breaching party to perform their part of the contract and may be appropriate in transactions involving the sale of land and/or unique goods, such as antiques or artwork. An injunction is a court order directing one party to perform an act or prohibiting a party from doing a specific act which is unlawful such as restraining a party from committing a (further) breach of contract. In all cases, the equitable remedy is

discretionary and may be granted where monetary compensation would be an inadequate remedy. Equitable remedies can be sought in addition to damages, or may be sought separately.

SUMMARY

The essence of a building contract is an agreement between the employer and the contractor. An agreement consists of a promise by the offeror to do or forebear from doing something and is accepted by the recipient who, in return, provides a corresponding promise to the offeror. These promises must be supported by valuable consideration from each party. Consideration is *an act or forbearance of the one party or the promise thereof is the price for which the promise of the other is bought*. A promise given by deed is an exception to this general rule. In building contracts the employer promises to pay, and the contractor promises to complete the works. They must also intend that their agreement is legally binding.

There are a number of circumstances, which may invalidate a contract. These are if a contract is *void, voidable* or *unenforceable*. Examples of void contracts include those for an illegal purpose, or where one or both parties make a mutual mistake about a fundamental fact. Contracts involving persons with restricted contractual capacity may also be void or voidable. Voidable contracts include those which are induced by misrepresentation, and/or involving fraud and/or lacking genuine consent. Contracts may be unenforceable where the essential formalities for the formation of the contract are absent.

The contents of a contract are referred to as its *terms*. These define the rights, obligations and rules underpinning the agreement and such terms may be express and/or implied. Not all statements made during the negotiations may have contractual effect; for example 'mere representations' are not considered to have legal effect'. The terms of a contract may be classified as 'conditions', which reflect vital aspects of the agreement and 'warranties' which concern secondary or less important matters. The contract may also incorporate exemption from liability clauses or limitation of liability clauses.

Discharge of contract refers to the various means by which a contract is brought to an end. A contract may be discharged: by performance, by agreement, by notice, by operation of law, by frustration, and/or by a breach of one of its fundamental terms.

Where a contract is breached, the innocent party has the right to seek a contractual remedy. In the vast majority of cases the remedy will take the form of monetary damages. In particular cases, however, remedies deriving from equity may be applied at the discretion of the courts to resolve cases where monetary compensation would not provide an appropriate remedy.

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