Cipa Foundation Lecture
Company and Contract Law

Rayyan Mughal
Solicitor (UK)

7 July 2021

Marks&Clerk

1

What we'll be covering

- Law of contracts
- Companies

2

Why is all this relevant?

- You need to pass the exam
- Relevant for your job
- Relevant for your life

3

To form a contract you need

- Offer and acceptance
- Consideration (or is it a deed)?
- Intention to create legal relations (inferred from outward behavior)
- Certainty of terms
- Additional:
  - Capacity to contract on both sides (i.e. not a minor/drunk/mentally incapacitated)
  - Genuine consent
  - Nothing which contravenes public policy

4

Key Issues

- Was it an offer or merely an invitation to treat?
- Was acceptance absolute and unconditional or was it a counter-offer?
- Was offer withdrawn before acceptance?
- Remember, contracts needn't be in writing.

5

Consideration

- Can be financial but needn't be adequate. Can be nominal.
- Can take place in the future but not the past.
- Needn't be financial.
- Can't be supplied by third party.
- Can't be illegal or comprise performance of existing public duty.

6

Other Issues

- Privity – only party to contract can enforce it unless contract provides otherwise.
- Can be assigned or novated.
- "Entire agreement" clause.
- "Non-reliance statements" (i.e. contractual estoppel).
- Can be varied but best variations recorded in writing.
- However, variations can be inferred from changed behaviour.

7

Terms of Contract – Conditions or Warranties?

- Condition is fundamental term. Breach merits repudiation of contract.
- Warranty is less fundamental. Breach merits claim for damages.
- Innominate – could be either. Court will decide.
- All this is rather vague so best the status of the terms (and the remedies for their breach) are specified in the contract.

8

Promissory Estoppel

"A shield not a sword"

- In general, a party (A) is unlikely to be able to rely upon an estoppel against another party (B), unless it can show:
  - Clear communication from (B) as to a particular state of affairs, or a shared understanding between A and B;
  - B intended A to rely upon that statement or promise;
  - A reasonably relied upon the communication or understanding to its detriment; and
  - B now seeks to resile from the original communication or understanding.

9

Misrepresentation

A statement which:

- Is untrue.
- Pertains to specific and verifiable fact or event.
- Induces other side to enter into contract.
- Causes loss.

10

Types of Misrepresentation

- Fraudulent – remedy is damages and/or rescission (i.e. parties put back in position they were in before contract entered into).
- Negligent – remedy as above.
- Innocent – remedy is rescission (damages in lieu of rescission?).

11

Mistake

- Unilateral mistake e.g. X sells to Y but thinks it is Z.
- Non-identical bilateral mistake – both parties make different mistake e.g. X sells Y a car, thinking that's what Y wants but Y wants a bicycle.
- Bilateral identical mistake – both parties make same mistake e.g. X sells Y a horse but neither realise it's dead.

"Non est factum."

12

Key contracts you'll come across

- IP assignments
- IP licences
- Employment contract
- Firm's terms of engagement
- Partnership agreement (if you're lucky)

13

Companies and basic company law

- Why relevant?
- Most of your clients (and the businesses they deal with) may be companies.
- You may be working for one.

14

Companies

- A company is a distinct legal entity registered and regulated under the Companies Act 2006.
- Owned by the shareholders. Companies may be owned by other companies.
- Fully liable for its debts but the liability of its members is:
  - Limited to the amount unpaid on its shares for a company limited by shares.
  - Limited to the amount they have agreed to pay on winding up for a company limited by guarantee.
  - Unlimited if the company is an unlimited one. These are quite rare.
- Public companies are listed on a stock exchange and the public can buy shares. However, they must comply with stringent regulations regarding disclosure and operation.

15

Setting up a company

- Private companies can only have one member so a good option for sole traders. No upper limit.
- Application for registration is made to Companies House and includes submitting the company name, registered office, initial shareholdings and statement of capital.
- Its constitution and operation are detailed in the Memorandum and Articles of Association.
- The shareholders won't be involved in running the company unless they are also directors.

16

What are the advantages?

- Limited liability – and it is very difficult to "lift the corporate veil".
- A separate legal entity from its owners – so their liability is compartmentalised and there is more security for customers, suppliers and employees.
- More tax efficient – only taxed on their profits.

17

What are the disadvantages?

- Because the company is a separate legal entity from its owners, they can't use it as their personal piggy bank. If they put assets (such as IP) into the company it may not be easy to take them out again.
- Shareholders may disagree with each other or the directors.
- Shareholders are vulnerable to dilution or takeover.
- Private companies have restrictions on the raising of capital by shares (i.e. authorised share capital)

18

Complex accounting requirements

- Must produce annual accounts in double entry format, balance sheets and other notes.
- Legal requirements regarding holding and minuting meetings, allotting shares, appointing directors.
- Numerous corporate governance issues – for directors as well as the company. A director has a fiduciary duty to the company so could end up facing a conflict of interest.

19

Conclusion

- Limited liability is a real draw but businesses may need professional advice (e.g. from accountants) to help with the red tape.
- This can be expensive and time consuming.
- Getting it wrong can result in a hefty fine.

20

Company directors – duties, responsibilities and liabilities

- A director has a fiduciary duty to the company. This comprises seven key duties found in sections 171-177 of the Companies Act 2006, namely:
  - Duty to act within powers
  - Duty to promote the success of the company
  - Duty to exercise independent judgment
  - Duty to exercise reasonable care, skill and diligence
  - Duty to avoid conflicts of interest
  - Duty not to accept benefits from third parties
  - Duty to declare interest in proposed transaction or arrangement

21

Examples I have had of clients affected by a breach of directors' duties

- Director of A was also a director of B. He invented IP for A and systematically syphoned it off into B. We had to draft an agreement ensuring all the IP ended up where it was meant to.

- Director of C was also a director of D, its contract manufacturer. He negotiated the manufacturing agreement for both sides and ensured D got a good deal at C's expense. When the contract came up for renewal we kept him out of the negotiation.

- X was a director of Y, our client. He asked us to draft a royalty agreement between him and Y with Y as the client (and paying our bill) but favouring him. He was somewhat put out when we declined(!)

22

Why this can be problematic for professional advisors

- The founders of a company are putting assets like IP into the company.
- They may be receiving money or shares in return.
- They are most likely also to be directors of the company so could be negotiating on behalf of the company too.
- How can they change hats without there being a conflict of interest?
- And who is our client – the founders as individuals or the company?
- What if the directors give us conflicting instructions?

23

Questions?

24

Contacts

Rayyan Mughal
rmughal@marks-clerk.com

+44 1223 345390

Marks & Clerk
62-68 Hills Road
Cambridge CB2 1LA
UK