HC 5, 14-12-2017, Common Law

The law of contract

Trade is very important for England today, even after the BREXIT. There are separate headings within the law of contract. There are specialty and simple contracts. These are two different laws of contract. Simple contracts are contracts which are not made by way of a 'deed'. Speciality contracts are. A deed is a document which is signed by both parties to the contract, it is written, and the requirements are very ancient. They have been used for a long time, for example for the transfer of real property. A deed has to be signed by both parties, and it has to be sealed. A seal has to be put on it. The deed also has to be delivered. Signed, sealed and delivered. Indenture means a deed drawn up in two parts. Nowadays a seal is not a requirement for private parties anymore. It is for commercial parties, they make a circle in which they put the letters: L.S. Locus Sili: place of sealing. Another possibility is a deed poll. This is not used in the law of contract. This is a deed which you can use to make a gift. It can be done unilaterally, when there is just one party. The person to whom you want to give the gift can always refuse it. Delivery is done by handing over the deed to the solicitor.

Why specialty contracts? It is mostly done between big companies in commercial actions. If the requirements of the deed are not met (signed, sealed, delivered) than it is not a deed. The concept of Merger means that when two parties make a contract they will start by negotiating. If you first make a contract by word of mouth (simple contract by agreeing) and later you want to change that into a deed than the rule of merger says a deed is the only thing that is valid. The rules of the deed are the only ones which are enforceable, not the ones agreed on by word of mouth. If they have agreed on everything they will draw up a deed which will finish the contract. The big advantage of using a deed is that you are certain of what you have agreed upon and when.

The Estoppel concept can be applied as well. Parol evidence rule: if it is in a deed, the only thing which you can use is the content of the deed, it is about the interpretation of the deed (*The countess of Rutland's case).* 'It would be inconvenient that matter in writing made by advice and on consideration and in which finally import the certain truth of the agreement of the parties should be controlled by the averment of the parties to be proved by the uncertain testimony of slippery memory. It basically means that people remember what they want to remember, it is not objective. What is written down is clear. This parol evidence rule is also the reason why a companies put in a clause where they say we want to go to the court of London, because they know there will not be asked for witnesses, they will just look at the deed, at what is written down.

Limitation of actions: if someone does something in breach of the contract, with simple contracts you can only go to court within 6 years. In case of a contract made by deed (specialty contract) you have 12 years. The last point is that for making specialty contract no consideration is required. Civil law systems do not know the requirement of consideration, but common law does in case of simple (informal) contracts.

Simple contracts (or parol contracts) are concluded when there is an agreement. One party makes an *offer*, the other party *accepts* is and legal relations are intended. The first books on the law of contracts came around in the 19th century. The last requirement is the requirement of consideration. 'Some right, interest, profit or benefit accruing to one party (promisor), or some forbearance, detriment, loss of responsibility given, suffered or undertaken by the other (promisee). You have to receive something for your promise to be binding. A unilateral promise is not binding (a gift). So for

unilateral promises you make up a deed. For a deed the requirement of consideration is not valid. You don't have to receive something.

Consideration

Sir Frederick Pollock: 'An act or forbearance of one party, or the promise thereof, is the price for which the promise of the other is bought, and the promise thus given for value is enforceable'. The promise is bought somehow. This is consideration. Quid pro quo. You can, *executed*: have a promise given in return for an act (writ of debt), or, *executory*: you can have a promise given in return for a promise (writ of indebitatus assumpsit). Regarding the simple contracts, you had to have covenants deed (writ of covenant). *Chappell CO Ltd v. Nestlé Co ltd (*page 107)*:* The House of Lords said that consideration had to have some value, but not adequate. Even chocolate bars wrappers can be consideration. 'When received the wrappers are of no value to the Nestle company.' This is irrelevant. A contracting party can stipulate for what consideration he chooses. Another case on this was *White v Bluett* (page 108). Was the promise to not complain a good consideration? The court said no. Such a promise has no value at all.

The law of bailment is a part of the law of personal property. You have bailment if an agreement is made for a specific purpose. To give a deposit, gratuitous agency, loan for use, pledge, loan for hire etc. Within civil law these are separate contracts. If it is not under the law of contracts, there is no consideration to be made.

Consideration has to be sufficient (*Collins v. Godefroy).* 'The promise to do something which you are already bound to do under general law is of no consideration for the other party'. Another case where the public duty exceeded was the *Glasbrooks Bros v Glamorgan County Council.* The police wanted money and this was consideration because they were doing special services, not their general duty.

These were public duties. Asking to pay for public duties is no consideration. With contracting duties this is different: in *Stilk v Myrick* they agreed to do what they were already bound to do. A promise under duress is something you can bring in to avoid the contract (*Williams v Roffey Bros & Nichols).* Williams had promised to put carpet down in 27 flats and he was promised 20.000 pounds for it. When 16.000 had been paid, Williams had some financial difficulties. He needed more but Roffey couldn't give it. Where the bargaining powers are not unequal the courts should be more ready to find the existence of a consideration (and there is not economic duress).

Fraudulent misrepresentation and mistake. They are voices of the will, whenever this occurs it is said that there is a will to make a contract, but it wouldn't have been there if there had not been fraud/mistake. So the contract is voidable at the instance of the person under duress/false impression. This is also the case for fraudulent misrepresentation, it is voidable. If there is a mistake it is void. If they do not agree upon these term, it is void and there is no contract at all. It makes a big difference with regard to third parties. When B makes the transfer, C becomes owner if he bought it before avoidance. Voidness is the consequences of mistake, voidable of fraudulent misrepresentation (*Cundy v Lindsay* and *Lewis v Averay).* Face to face is voidable.

A	B	C
Sold car	Not owner, owner until avoidance	not owner, bought before avoidance

The law of property

First of all there is real property. This includes immovables (like houses and land). The king used to be the owner of all the land. The others were his tenants. This was the feudal system. All cases on

immovables had to be brought before the royal courts. There also is personal property. This includes movables. Personal property has a much later date or origin. Trust law is quite alien to civil law systems. It has to do with both real and personal property.