THE SURVEYOR AND THE LAW OF CONTRACT

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PRESENTATION OUTLINE

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INTRODUCTION

Background

➢ Law of contract is essential.

➢ Life is regulated by contracts in one way or the other.

➢ For VES, LS, and QS contract law is a very important legal subject as the Land Market and construction industry where we play keys role are regulated by contracts.

➢ Clear understanding of the subject is therefore crucial to enable us as Surveyors perform our roles and tasks assigned.

➢ We have all done some studies about contracts, so this evening it is going to be refreshing of our minds and perhaps better understanding of some of the issues.
WHAT IS CONTRACT

➢ A legally binding agreement between two or more parties. Discuss.

➢ Not all agreements are binding and therefore cannot be said to be contracts.

➢ A contract is basically a Common Law Discipline but in many jurisdictions the subject is regulated or supported by legislation. E.g. Contracts Act 1960 Act 25.

➢ As a general rule parties may impose any terms and conditions in the contract they wish. The only limiting factors are statutes, moral considerations, public policy etc.
**TERMS OF CONTRACT**

Contract may be oral, in writing or under seal.

Contract may be express, or implied (by the statutes or by court).

Terms are the legal obligations that flow from the Contract.

Terms must be express, and clear. It is the terms that create the contractual relation.

When a contract is not performed it is the term that is being complained of.

In many commercial/business/contracts there are templates for terms and conditions e.g. Public Procurement Act, 2003 (Act 663) as amended (Procurement Act allows for additions and even departure)

• Adopt to suit your contract – not just cut and paste. For QS issues like Preliminaries – no room is at times made for these (watchman, condoning of sites, T&T, etc.) – should it be interpreted as part of the rates. Conveyancing Decree also has templates
ESSENTIAL INGREDIENTS

**OFFER**
A proposal from one party to another intended to trigger a legal relationship

**PRINCIPLES:**
• To be valid it must be clear, definite, complete and final.

• Offer must be communicated.

Offer is different from invitation to treat (goods on display in a shop, Adverts, Auction, Tender).
TERMINATION OF OFFER

- Until accepted offer can be revoked ie Withdrawn,
  Revocation must be communicated to offeree.
- Lapse, etc etc
- Offer can be rejected- and offeree cannot come back to accept.
- Counter offer amounts to rejection and creating a new offer.- Hyde v Wrench (1840)

NSIAH VRS. DEEGBE

An offer was made to the sitting tenant for the sale of a house. He wrote asking for reduction in offer price and made a counter proposal. Held; counter offer revolved initial offer.

Note; an enquiry will not constitute counter offer.- Stevenson vs. Maclean
ACCEPTANCE
An assent to the terms of the offer. Has to be final and unconditional

PRINCIPLES
• Offer must still be in force and open to acceptance
• Acceptance must be unconditional and must not introduce any fresh terms of a significant or material nature
• Must be communicated else has no effect.
• Mode of communication depends; Prescribed method
Medium by which offer was made.
Reasonable means
ACCEPTANCE (Contd)

EXCEPTION;
• Postal rule
• Performance if so specified by offeror
CONSIDERATION
Very important. It cements the deal
What is given in return by each of the parties
Failure of consideration will negative the supposed contract.

RULES
• Must be real i.e. actual or quantifiable not token or nominal.
• Need not be adequate but sufficient.
• Must not be past.
• Only a party who provides consideration can bring an action.
INTENTION TO CREATE LEGAL RELATIONS.
Many agreements are not intended to create legally binding contracts eg. Social promises, Baffour V Baffour.

For business, building and commercial agreements there is a presumption that the parties meant “business” unless it is rebutted.

CAPACITY
• Must be of adult, sound mind and fully comprehend what is intended.
• For Companies/co-operations it must be within their scope of power- ie articles of incorporation; Enabling Statutes etc. Societies- Constitution

Lack capacity; Minors, insane persons and excessively drunk people

MINORS (Exception)
• Contract for necessaries
• Contracts for education and training.
• Contracts of continuing nature
VITIATING FACTORS
- These are the matters which affect the contract once it is formed.
- Vitiating factors will make a contract unenforceable etc.
- Void – Here, there will be no contract (illegality – minors, drunkards)
- Voidable – Valid but can be avoided (certain mistakes say as the identity)
- Binding – Can be enforced.

MISTAKE
Generally mistakes do not preclude validity unless the mistake goes to the root or so substantial. E.g. of mistakes that will nullify contract.
- Subject matter
- Mistake as to identity of some party.
- Mistake as to nature of document signed.
MISREPRESENTATIONS
▪ Statement of fact which may be false or not correct made by one party to the other with the aim of persuading the latter to enter into a contract which indeed results in his actual contracting.

▪ To constitute misrepresentation statement must be one of facts not opinion e.g. For it to the fatal, the misrepresentation must be made during negotiations.

FRAUD
▪ Person making statement does not belief it is true or does not care whether true or false. Fraud vitiates everything.
Undue Influence
Certain contracts may not be enforceable because of influences of one party on the other.

• Improper pressure

• Actual (threat of prosecution of self / relatives)

• Special relationship- May cause victimization
  Parent / Child (guardian/ward)
  Trustee / beneficiary etc
  Religious adviser/ disciple
  Doctor – Patient
  Lawyer – Client
  Surveyor- Client
Duress

- Actual or threatened violence
- Unlawful Constraint
- Compulsion or coercion
  (of the contracting parties)

Rebutting

“the free exercise of independent will”
Unconscionable Bargain

• Catching bargains

• Property of reversionary interest

• Dealing with Poor / Ignorant People or weak minded.

Evans VS Llevellion

A poor man became entitled to a share of an Estate worth £1,700.00. He sold it for 200 guineas cash. Later it was set aside as it was “improvidently obtained”. Such persons need special protection.

• Inequality of bargains

People taking advantage of the marked inequality of the bargaining power.
DISCHARGE OF CONTRACT

This means the contract has come to an end. Discharge can occur.

- Performance
- Agreement
- Frustration
- Breach

Performance
- Each party must perform his/her obligation completely. E.g. Building/Engineering works performance entails completion of the specified works by the employer, if there are hidden defects contract has not been performed.
Sampter vrs. Hedges
- Contract to build two (2) houses at £566. He completed to the value of £333 and then abandoned the work for lack of funds. Plaintiff cannot succeed in claiming for work done.

Exceptions
- Divisible or severeable contracts
- Sustainable performance
- Prevention of Performance
AGREEMENT
By agreement a contract may come to an end

FRUSTRATION
▪ By pristine C.L principle obligations are absolute and contract is not discharged because it is difficult or expensive than expected to carry.
▪ Law developed to allow frustration where supervening events makes it impossible to carry out.

DAVIS CONSTRUCTORS VRS FAREHAM
Contract to build 73 houses in 8 months. Due to lack of skilled labour and shortage of material, work could not be completed in 22 months. Cost had risen sharply.
Held: contract was frustrated

Note Supervening event must not be contemplated.
E.g. of Frustration
▪ Destruction of Subject Matter
▪ Death or serious injury
▪ Government interference
Frustration renders contract void.
BREACH
Failure to perform part of bargain. If breach is serious, the innocent party may treat the other party as having repudiated the whole contract.

REMEDIES
A number of Common Law and Equitable remedies exist.

DAMAGES
If payment of compensation or money can make up for the loss.
- Un-liquidated Damages
Where parties did not make a pre – assessment of damages to be paid in the event of breach.
Public policy forbids payment for all loses.
Only those which naturally arises from the breach.
Injured party must mitigate his loss and plaintiff can claim for:
- General Damages
- Special Damages
- Nominal Damages
LIQUIDATED DAMAGES
This is where an assessment of damages is payable under the contract. It will be valid if it is a genuine attempt to pre-estimate the likely loss. L. Q should not be confused with penalty.

EQUITABLE REMEDIES
Developed to supplement Common Law remedies as damages may be inadequate. Discretionary – not as of right but given on the balance of facts and fairness

SPECIFIC PERFORMANCE
• Order from court directing performance of a promise
• Normally given where subject matter is unique e.g. land sales, rentals etc.
• Not awarded for contract for personal services or minors.
• Examples where S.P. will be ordered in a building contract:
  • Building which is clearly specified (preferably with BOQS and drawings)
  • Plaintiff has special interest in work being done and damages will not suffice
Def is in possession of land hence not feasible to employ another builder
**Wolverhampton Corporation Vrs. Emmons (1901)**
Building contract where def agreed to build new houses on land he acquired from plaintiff. The court granted the corporation’s request for S.P. as all the three conditions above.

**INJUNCTION**
It is an order by a court to prevent a party from going back on his promise. So many cases on this. FKA Vrs. Rev. Nana Tsibu.

**RECISSION**
Setting aside the contract.
The effect is that parties return to their pre – contract state. It can be done by mutual agreement by parties.

**PRINCIPLES OF QUANTUM MERUIT**
Reasonable payment for work done although total performance under contract is not achieved.
It is a claim for reasonable remuneration as opposed to actual loss suffered
SKANSA VRS KLIMATENIK
Proposal for a subcontractor to install air conditioners, heating system etc. at Golden Tulip Hotel. Following discussions a draft contract was prepared but not signed. Subcontractor commenced work. Later a disagreement arose between the parties. The subcontract could not secure performance bond. Main contractor wrote terminating contract. Court held that, there was no contract but subcontractor was entitled to payment on Quantum Meruit basis.
INTERPRETATION OF CONTRACTS

• By interpretation, it implies the ascertainment of the words used by the contracting parties and the determination (subject to rule of law) the legal effects of these words.

• The object of interpretation is to ascertain the actual intention of the parties as to the legal obligations each assumed by the contractual words, and thus give effect to their true intentions. For purpose of construction of contracts, the intention of the parties is the meaning of the words they have used. There is no intention independent of that meaning.

BASIC RULES
1. Interpretation must be as near as possible to the purposes at the core of the text as the law would permit.
BASIC RULES (Contd..)

2. The interpretation of the documents must at first instance be sought for in the text itself taking into account the proper context. (There is no art to find the mind’s construction in the face Shakespeare in Macbeth). If it is written, evidence will not be allowed to add, vary or contradict it - parole evidence rule.

3. The document must be construed as a whole. If there are supplementary contract documents they must all be taken together.

4. To construe the intention of the parties, the words must be given their ordinary meaning bearing in mind the full content and context.

5. Where appropriate the technical meaning and or business practices will be relied on to glean the actual intention of the parties.
6. Where the ordinary or technical meaning will lead to absurdity repugnancy or inconsistency with the purpose or intention at the core of the text, the secondary meaning which the words are capable of bearing will be relied on. (Ambiguity Avoidance).

7. The court has limited power to read-in words they consider to be necessarily implied or inferred from the terms of the contract.

8. The court also has limited power to correct mistakes either by construction or by rectification.
CONCLUDING REMARKS

▪ Focus on what you want by entering into the contract.

▪ As much as possible avoid phrases or words that are ambiguous. Simple, clear language must be used.

▪ If the words are unambiguous they cannot be departed from merely because they lead to consequences which we consider capricious or even harsh and unreasonable” . Lord Cranworth in Abbot v Middleton.

▪ That is what you, with all your senses ON and eyes wide opened bargained for, and effect must be given to it.

▪ Please use Lawyers experienced in the subject area, where necessary.

▪ May I suggest that, a forum be afforded ( perhaps bigger audience) where we will again discuss the subject but in more detail with examples concerning our field.
Thanks for participation.

ME DA WOASE