to, another member of the Armed Forces on duty, provided that the death or injury arose out of service which ranked for the purpose of pension. This section was repealed in regard to acts or omissions causing injury after 15 May 1987 (see Crown Proceedings (Armed Forces) Act 1987). It follows that any claim by members of the armed forces for injury or death occurring between 1947 and 1987 is barred. In this connection, claims relating to injury for exposure to asbestos dust during that period have come before the courts alleging that Art 6 (fair trial) and Art 2 (right to life) of the Human Rights Convention were infringed by s 10 of the 1947 Act. The House of Lords ruled that there was no infringement of the Convention since s 10 created an issue of procedure not substantive law to which the Convention could be applied (see *Matthews* v *Ministry of Defence* [2003] 2 WLR 435). However, this does not mean that service men and women will necessarily win a claim against the Crown. Thus in an action against the Crown for injury caused by negligence the person making the claim will, as a civilian would, have to prove that there was a duty of care owed to him or her which was breached (see further Chapter 21). Thus in *Mulcahy* v *Ministry of Defence* (1996) *The Times*, 27 February the claimant was a soldier serving in the Gulf War who suffered damage to his hearing when a fellow soldier fired a shell from a howitzer. He lost the case because the Court of Appeal decided that there was no duty of care between service personnel in battle conditions.

Actions under the Act may be brought in the High Court or a county court, and under ss 17 and 18 of the 1947 Act the Treasury is required to publish a list of authorised government departments for the purposes of the Act, and of their solicitors. Actions by the Crown will be brought by the authorised department in its own name, or by the Attorney-General. Actions against the Crown are to be brought against the appropriate department, or, where there is doubt as to the department responsible or appropriate, against the Attorney-General.

In any civil proceedings by or against the Crown, the court can make such orders as it can make in proceedings between subjects, except that no injunction or order for specific performance can normally be granted against the Crown (but see below). The court can, in lieu thereof, make an order declaratory of the rights of the parties in the hope that the Crown will abide by it. No order for the recovery of land, or delivery up of property, can be made against the Crown, but the court may instead make an order that the claimant is entitled as against the Crown to land or to other property or to possession thereof. No execution or attachment will issue to enforce payment by the Crown of any money or costs. The procedure is for the successful party to apply for a certificate in the prescribed form giving particulars of the order. This is served on the solicitor for the department concerned, which is then required to pay the sum due with interest if any. The above exceptions show that, in spite of the Act, the rights of the subject against the Crown are still somewhat imperfect.

However, injunctions can be granted against officers of the Crown personally, even though acting in their official capacity. Thus, in *M* v *Home Office* [1993] 3 WLR 433, a mandatory injunction was issued against the Home Secretary for contempt of court, to achieve the return to this country of a person deported while his case for political asylum was still under review by the court.

Following the decisions of the House of Lords in *M* v *Home Office* (see above) and *Factortame* v *Secretary of State for Transport (No 2)* (1991) 1 All ER 70 it would appear that while a permanent injunction cannot be granted against the Crown injunctive relief by way of interim relief can be given, e.g. to suspend the operation of legislation said to be inconsistent with Community law.

For historic, constitutional and procedural reasons also, the Crown cannot be prosecuted for crime. Once again a nominated defendant is put forward; e.g. for a road traffic offence, such as using a lorry with a defective tyre, the principal transport officer of the Department concerned would probably be nominated. Unfortunately, this practice results in the officer concerned acquiring a long record of motoring convictions in a personal capacity. Accordingly,

in *Barnett* v *French* [1981] 1 WLR 848, the Court of Appeal suggested the use of the name 'John Doe' for the nominated defendant who, for the purpose of criminal records, would be shown as having a date of birth 'circa 1657'. The name 'John Doe' was used in civil actions from about that time onwards as part of a very elaborate procedure to prove the title to land. The procedure is no longer in use.

The general rule that statutes do not bind the Crown unless by express words or necessary implication is contained in s 40 of the 1947 Act. It produced an absurd result when it was decided that public health and hygiene legislation did not apply to National Health Service hospital kitchens. This anomaly was abolished by the National Health Service (Amendment) Act 1986 though the general immunity in other areas given by s 40 was preserved.

Crown privilege in civil proceedings

As we have seen, either party to a civil action can, amongst other things, ask the court to order the other party to produce any relevant documents for inspection: a process called disclosure (see Chapter 5). Under s 28 of the Crown Proceedings Act 1947, this right lies against the Crown though the Crown could refuse to obey the order if production of the document(s) would be injurious to the public interest. It had been felt for some time that Ministers whose departments were involved in civil litigation had abused this right. Undoubtedly, some claimants failed in an action against the Crown because even the judge could not obtain access to documents necessary to support the claim. As a result of a number of cases of this kind, the House of Lords decided, in *Conway* v *Rimmer* [1968] 1 All ER 874, that even though a Minister certifies that production of a particular document would be against the public interest, the judge may nevertheless see it and decide whether the Minister's view is correct. If the judge cannot accept the Minister's decision, he may overrule him and order disclosure of the document to the party concerned. Thus the decision of the Minister is no longer conclusive though it is unlikely that a judge would order disclosure if there was a danger of real prejudice to the national interest.

However, despite *dicta* in *Conway* v *Rimmer* that claims to privilege on grounds of confidentiality could not expect sympathetic treatment, the courts vary in their interpretation of this view.

Norwich Pharmacal Co v *Commissioners of Customs and Excise*, 1973 – Crown or public interest privilege: documents (**44**)

Alfred Crompton Amusement Machines v *Customs and Excise Commissioners (No 2)*, 1973 – Non-disclosure of documents: privilege (**45**)

Privilege in civil proceedings – the public interest ground

Privilege extends beyond cases against the Crown. Thus in *D* v *NSPCC* [1977] 1 All ER 589 the House of Lords held that the NSPCC or a local authority is entitled to privilege from disclosing the names of its informants in relation to child neglect or ill-treatment.

The House of Lords decided in *British Steel Corporation* v *Granada Television* [1980] 3 WLR 774 that the information media and their journalists do not have immunity from the obligation to disclose their sources of information when disclosure is necessary in the interests of justice. Their Lordships went on to say, however, that the remedy is equitable and may be withheld in the public interest.

Public interest privilege has really replaced the older Crown privilege. However, the latter has been included as a separate head of privilege to show the historical development.

Legal professional privilege

Two kinds of legal professional privilege protect some communications from disclosure to other parties to legal proceedings as follows:

- ***legal advice privilege*** which protects communications between solicitor and client where the purpose is to obtain legal advice regardless of whether litigation is pending or in contemplation; and
- ***litigation privilege*** which protects communications between solicitor and client and a third party where the primary purpose for which the document was brought into existence was, from the beginning, its use in pending or contemplated litigation.

Legal advice privilege was affirmed by the House of Lords in *R* v *Special Commissioner, ex parte Morgan Grenfell & Co Ltd* [2002] STC 786. Their Lordships ruled that documents in the taxpayer's possession but prepared for the purpose of seeking legal advice from solicitors on tax matters were subject to legal professional privilege and need not be disclosed to an inspector of taxes whether they were in possession of the solicitor or the client.

The privilege is confined to lawyers and so whether communications between accountants and their clients is privileged presents a difficulty. However, in such a case the client may be able to claim successfully the right to privacy in Art 8 of the Human Rights Convention in order to justify refusal to produce tax advice given to the client by accountants to the tax authorities under a Revenue notice to do so.

Some difficulties have arisen in connection with legal advice given by lawyers in the presentation of legal advice to a public or other inquiry where litigation is not necessarily in view. However, in *Three Rivers DC* v *Bank of England* [2005] 1 AC 610 the House of Lords affirmed that such advice did come within legal advice privilege. The case arose from legal advice given in an inquiry into the collapse of the Bank of Credit and Commerce International.

Part 2

THE LAW OF CONTRACT

9

MAKING THE CONTRACT I

A contract may be defined as an *agreement*, enforceable by the law, between two or more persons to do or abstain from doing some act or acts, their intention being to create *legal relations* and not merely to exchange mutual promises, both having given something, or having promised to give something of value as consideration for any benefit derived from the agreement. As regards the requirement that consideration must be supplied by a party to a contract, this is subject to a number of exceptions, including arrangements made under the Contracts (Rights of Third Parties) Act 1999.

The definition can be criticised in that some contracts turn out to be unenforceable and, in addition, not all legally binding agreements are true contracts. For example, a transaction by deed derives its legally binding quality from the special way in which it is made rather than from the operation of the laws of contract, e.g. a deed is enforceable even in the absence of valuable consideration. In consequence, transactions by deed are not true contracts at all. Nevertheless, the definition at least emphasises the fact that the basic elements of contracts are (i) an agreement, (ii) an intention to create legal relations, and (iii) valuable consideration. It should be noted that even in the exceptional case where a third party who has not supplied consideration can claim under the contract, that underlying contract must be supported by consideration given one to the other by the parties unless it is a deed.

The essentials of a valid contract

The essential elements of the formation of a valid and enforceable contract can be summarised under the following headings:

(*a*) There must be an offer and acceptance, which is in effect the agreement.
(*b*) There must be an intention to create legal relations.
(*c*) There is a requirement of written formalities in some cases.
(*d*) There must be consideration (unless the agreement is by deed).
(*e*) The parties must have capacity to contract.
(*f*) There must be genuineness of consent by the parties to the terms of the contract.
(*g*) The contract must not be contrary to public policy.

In the absence of one or more of these essentials, the contract may be void, voidable, or unenforceable.

Classification of contracts

Before proceeding to examine the meaning and significance of the points set out above, the following distinctions should be noted.

Void, voidable and unenforceable contracts

A *void* contract has no binding effect at all, and in reality the expression is a contradiction in terms. However, it has been used by lawyers for a long time in order to describe particular situations in the law of contract and its usage is now a matter of convenience. A *voidable* contract is binding but one party has the right, at his option, to set it aside. An *unenforceable* contract is valid in all respects except that it cannot be enforced in a court of law by one or both of the parties should the other refuse to carry out his obligations under it. This sounds strange but property or money which has passed from one party to the other under the contract can be retained by that party. The contract can be used as a *defence* if the party brings a claim to recover the property or money. So the contract has some life; it is not void. Contracts of guarantee are unenforceable unless evidenced in writing (see further Chapter 11).

Executed and executory contracts

A contract is said to be *executed* when one or both of the parties have done all that the contract requires. A contract is said to be *executory* when the obligations of one or both of the parties remain to be carried out. For example, if A and B agree to exchange A's scooter for B's motor cycle and do it immediately, the *possession* of the goods and the *right* to the goods are transferred *together* and the contract is *executed*. If they agree to exchange the following week the *right* to the goods is transferred but not the *possession* and the contract is *executory*. Thus an *executed* contract conveys a *chose in possession*, while an *executory* contract conveys a *chose in action* (see Chapter 22).

Specialty contracts

Specialty contracts are also called deeds.

The general law of contract *requires* a deed in the case of a lease of more than three years, which must be made as a deed if it is to create a legal estate (see further Chapter 22). In addition, a transfer of property, e.g. a conveyance, which imposes covenants (or agreements) in regard, for example, to the use of the land, is a contract and must also be by deed. In addition, a conveyance is an agreement by the vendor of land to convey his title or ownership and the agreement of the purchaser to take it.

As regards the *form* of a deed the Law of Property (Miscellaneous Provisions) Act 1989 is now relevant. Section 1 requires, as before, that a deed must be in writing but gets rid of the requirement for sealing where a deed is entered into by an individual. The signature of the individual making the deed must be witnessed and attested. Attestation consists of a statement that the deed has been signed in the presence of a witness.

The section also provides that it must be made clear on the face of the document that it is intended to be a deed. The usual form to satisfy this requirement and attestation is: 'signed as a deed by AB in the presence of XY'.

As far as companies are concerned, s 44 of the Companies Act 2006 provides that while a company may continue to execute documents by putting its common seal on them it need not have such a seal. Any document signed by an authorised signatory such as a director and the secretary of the company if it has one, or by two directors and said to be executed by the

company will be regarded as if the seal had been put on it. Once again, it must be made clear on the face of the document that it is intended to be a deed and the form here could be as follows: 'signed as a deed: AB director and CD secretary (or another director) – for and on behalf of Boxo Ltd'.

A deed has certain characteristics which distinguish it from a simple contract:

(a) Merger. If a simple contract is afterwards embodied in a deed made between the same parties, the simple contract merges into, or is swallowed up by the deed, for the deed is the superior document. The deed is then the only contract between the parties. But if the deed is only intended to cover part of the terms of the previous simple contract, there is no merger of that part of the simple contract not covered by the deed.

(b) Limitation of actions. The right of action under a specialty contract is barred unless it is brought within 12 years from the date when the cause of action arises on it, i.e. when the deed could first have been sued upon, which is in general when one party failed to carry out a duty under it. For example, A and B make a contract by deed on 1 March. B is due to pay money under it on 1 April and fails to do so. Time runs from 1 April not 1 March as regards a claim by A. A similar right of action is barred under a simple contract after only six years.

However, it would appear from a ruling of the Court of Appeal that when a business is dealing with another business of broadly equal negotiating power as distinct from a consumer the above period, certainly of six years, can be much reduced thus shortening the period of potential liability for breach of contract (see *Granville Oil and Chemicals Ltd* v *Davis Turner & Co Ltd* (2003) (unreported)). In that case a simple contract stated that action was barred nine months after the provision of a service. The Court of Appeal ruled that the period must be adhered to. It was not an unfair term (see further Chapter 18).

(c) Consideration is not essential to support a deed, though specific performance, which requires a party in default to actually carry out the contract as distinct from paying damages, will not be granted if the promise is gratuitous (see Chapter 18). Simple contracts must be supported by consideration.

(d) Estoppel. Statements in a deed tend to be conclusive against the party making them, and although he might be able to prove they were not true, the rule of evidence called 'estoppel' will prevent him from doing this by excluding the very evidence which would be needed. In modern law, however, a deed does not operate as an estoppel where one of the parties wishes to bring evidence to show fraud, duress, mistake, lack of capacity or illegality.

Simple contracts form the great majority of contracts, and are sometimes referred to as parol contracts. This class includes all contracts not by deed, and for their enforcement they require consideration. Simple contracts may be made orally or in writing, or they may be inferred from the conduct of the parties; but no simple contract can exist which does not arise from a valid offer and a valid acceptance supported by some consideration. When these elements exist, the contract is valid in the absence of some defect such as lack of capacity of one of the parties, lack of reality of consent, or illegality or impossibility of performance.

The formation of a contract

In order to decide whether a contract has come into being, it is necessary to establish that there has been an *agreement* between the parties. In consequence, it must be shown that an *offer* was made by one party (called the offeror) which was *accepted* by the other party (called the offeree) and that *legal relations* were intended.

Agreement

A contract is an agreement and comes into existence when one party makes an offer which the other accepts. The person making the offer is called the offeror, and the person to whom it is made is called the offeree. An offer may be express or implied. Suppose X says to Y – 'I will sell you this watch for £5', and Y says – 'I agree'. An express offer and acceptance have been made; X is the offeror and Y the offeree. Alternatively, Y may say to X: 'I will give you £5 for that watch'. If X says: 'I agree', then another express offer has been made, but Y is the offeror and X is the offeree. In both cases, the acceptance brings a contract into being. In order to find out who makes the offer and who the acceptance, it is necessary to examine the way in which the contract is negotiated.

Offer and invitation to treat

An offer is an undertaking by the offeror that he will be bound in contract by the offer if there is a proper acceptance of it. An offer may be made to a specific person or to any member of a group of persons, and in cases of an offer embracing a promise for an act designed to produce a unilateral contract, to the world at large.

Carlill v *Carbolic Smoke Ball Co*, 1893 – Offer: the unilateral situation (**46**)

Invitation to treat – auctions

Problems relating to contractual offers have arisen in the case of *auction sales* but the position is now largely resolved. An advertisement of an auction is not an offer to hold it. At an auction the bid is the offer; the auctioneer's request for bids is merely an invitation to treat. The sale is complete when the hammer falls, and until that time any bid may be withdrawn (*Payne* v *Cave* (1789) 3 Term Rep 148).

Where an auction is expressly advertised as subject to a 'reserve price' the above rules are not applied and there is no contract unless and until the reserve price is met and this is so even if the auctioneer knocks the goods down below the reserve price by mistake (*McManus* v *Fortescue* [1907] 2 KB 1). The auctioneer is not liable for a breach of warranty of authority to sell at the price knocked down because the sale is advertised as being subject to a reserve and this indicates to those attending the sale that the auctioneer's authority is limited.

The position when the auction is without reserve is not absolutely certain because it has never been clearly decided whether an advertisement to sell articles by auction without any reserve price constitutes an offer to sell to the highest bidder. It is at any rate clear that s 57(2) of the Sale of Goods Act 1979 prevents any *contract of sale* coming into existence if the auctioneer refuses to accept the highest bid. There remains the possibility once the auction of an item has begun that the auctioneer may be liable in damages on the basis of a breach of warranty that he has authority to sell, and will sell, the goods to the highest bidder. This device appears to be sanctioned by *obiter dicta*, i.e. statements made by the court which were not part of its decision (see further Chapter 7), of the Court of Exchequer Chamber in *Warlow* v *Harrison* (1859) 1 E & E 309.

Harris v *Nickerson*, 1873 – Invitation to treat: the auction situation (**47**)

Invitation to treat – price indications: price lists and catalogues

If I expose in my shop window a coat priced £50, this is not an offer to sell. It is not possible for a person to enter the shop and say: 'I accept your offer; here is the £50.' It is the would-be buyer who makes the offer when tendering the money. If by chance the coat has been wrongly priced, I shall be entitled to say: 'I am sorry; the price is £100', and refuse to sell. An invitation to treat is often merely a statement of the price and not an offer to sell.

The same principles have been applied to prices set out in price lists, catalogues, circulars, newspapers and magazines.

> *Pharmaceutical Society of Great Britain* v *Boots Cash Chemists (Southern) Ltd*, 1953 – Price indications (**48**)
>
> *Partridge* v *Crittenden*, 1968 – Magazines and circulars (**49**)

Company prospectuses/advertisements in connection with sale of securities

A prospectus/listing particulars issued by a company in order to invite the public to subscribe for its shares (or debentures, i.e. loan capital) is an invitation to treat, so that members of the investing public offer to buy the securities when they apply for them and the company, being the acceptor, will only accept the proportion of public offers which matches the shares or debentures which the company wishes to issue. If there are more offers than shares, the issue is said to be over-subscribed. Some applicants then get no shares at all or only a proportion of what they applied for. The conditions of issue also allow the company to make a binding contract by a *partial* acceptance in this way. Normally acceptance must be absolute and unconditional.

A prospectus is used where the shares are offered on say the Alternative Investment Market and listing particulars are used where the company has a full listing on the main London Stock Exchange.

Other situations

In other cases, such as automatic vending machines, the position is doubtful, and it may be that such machines are invitations to treat. However, it is more likely that the provision of the machine represents an implied offer which is accepted when a coin is put into it. However, it does seem that if a bus travels along a certain route, there is an *implied offer* on the part of its owners to carry passengers at the published fares for the various stages, and it would appear that when a passenger puts himself either on the platform or inside the bus, he makes an *implied acceptance* of the offer, agreeing to be bound by the company's conditions and to pay the appropriate fare: *per* Lord Greene *obiter* in *Wilkie* v *London Passenger Transport Board* [1947] 1 All ER 258.

Price indications

The court may find in a variety of circumstances that an alleged offer is a mere price indication.

> *Harvey* v *Facey*, 1893 – Offers and price indications (**50**)

Those in business clearly require to contract on somewhat firmer ground than is indicated by the above materials. It is therefore common in business contracts to indicate clearly by a