Podcast 2: Thinking about terms

This podcast will introduce you to the key themes and topics covered in Part II of the book. The focus of Part II of the book is on how we use the law to determine the scope and extent of the rights and obligations which a contract confers or imposes on the parties to it. This follows in logical sequence from Part I, which focused on the formation of contracts. Once you know that a contract exists, the next step logically is to ask what the contract requires the parties to do.

In law, we refer to the set of things which the contract requires the parties to do as the terms of the contract. The terms of a contract are of fundamental importance to contracting. It is the terms of a contract that determine what rights and obligations the parties have, and what they need to do in order to comply with the contract. For example, to continue with the example we used in podcast for Part I, your contract with Facebook gives you the right to access Facebook's server via its web interface or its smartphone and tablet apps, to use that access to create a profile, upload media, and post updates, and to exercise a limited amount of choice in relation to how Facebook uses the data it generates from your use of its service. It also gives Facebook a very broad right to terminate the contract if you breach the terms of service. At the same time, the contract also imposes a range of obligations and duties on you, such as the obligation to provide accurate information in the profile you set up with Facebook and to comply with Facebook's policies in relation to what you do on Facebook.

The law engages with the terms of contracts in two different ways. Firstly, it gives effect to the terms on which the parties have reached agreement. It seeks to determine what the terms are, what they mean, what they require the parties to do, and what should be done when they don't directly cover the situation that has arisen—for example, where a situation has arisen which the parties did not foresee, and for which their contract does not provide. The second way in which it engages with the terms of contracts, in contrast, is supervisory rather than facilitatory. The law sets boundaries on freedom of contract, declaring certain types of terms to be legally unenforceable and declaring other types of terms to be legally mandatory. If you buy a new electronic gadget from a business, for example, as a matter of law they are required to give you a warranty in relation to certain matters for a minimum period of time.

In Part II, our focus is on the first of these—the way in which the law approaches the task of giving effect to the parties' agreement; the legal rules, principles, and concepts that we use in dealing with the questions that arise in this area, and the strengths and weaknesses of the approach English law takes in dealing with the terms of a contract. The second task—the task of setting boundaries to freedom of contract—is dealt with in Part III of this book.

In dealing with the task of giving effect to the terms of a contract, the law faces five sets of issues. Each of the five chapters in this part is devoted to one of these sets of issues.

The first of these sets of issues involves determining what the terms of a given contract are. This set of issues becomes particularly salient in situations where you do not have a single definitive document that records all the terms on which the parties agreed. Here, the law has to start by assembling the contract: putting it together from the things the parties said, did, and wrote in the course of contracting. The legal rules we apply in doing this are discussed in Chapter 6.

The second set of issues relates to determining what a contract means. Contracts are not always

written in the clearest of ways, and it is not always clear what a given term actually requires a party to do. To deal with this issue, we apply a set of rules that tell us how to interpret contractual terms. These rules are discussed in Chapter 7.

The third set of issues deals with the fact that contracts very often leave things unsaid. Not every duty to which a party is subject will be written down in a contract. It will sometimes be necessary to infer a party's duties from the other terms set out in the contract, or from the social or commercial context in which the transaction took place. In law, we deal with this issue through the rules connected with implied terms. These are discussed in Chapter 8.

The fourth set of issues arises because parties sometimes leave issues open at the time they enter into a contract, usually in the expectation that they will reach agreement on those issues at a future date. If they then do not reach agreement, the law faces a challenge because there are aspects of the transaction on which the parties haven't agreed on their rights and duties. The rules that are applied in order to deal with this problem are set out in Chapter 9.

The fifth, and final, set of issues arises because things sometimes change. Contracts are grounded in assumptions which the parties make. These assumptions often hold true, but sometimes they fall by the wayside, either because they were always wrong or because things changed to make them no longer true. The law has had to deal with a cases where precisely this happened, in circumstances ranging from the outbreak of war making shipping impossible, to municipal authorities condemning a very popular venue in a city just before a major rock concert was supposed to be held there. Chapter 10 discusses how English law approaches this task, and the main legal principles that are applied in dealing with it.

There is one important point which you should keep in mind when studying these doctrines. The law in relation to contractual terms is fundamentally about giving effect to the terms which the parties have selected. This means that judges see their job as being to figure out what the parties have actually agreed to do. This has two implications. Firstly, it means that judges do not try to make the contract fairer or more efficient. Tinkering with contracts is not the courts' job. Giving effect to the contract is the courts' job. Although the law sets some limits to freedom of contract, within those limits the parties' terms reign supreme. The result is that there are many cases in which the terms of the contract have been obviously flawed, and in which the courts have refused to fix the flaws. If the parties have produced flawed terms, then it is those flawed terms that will be enforced. Fixing the flaws is a task best left to the parties, rather than judges.

Secondly, virtually all the tests we will study in this Part are objective rather than subjective. You have already come across the objective test in relation to formation in Part I of the book, and it has an equal if not greater importance in relation to the terms of the contract. Judges are not telepaths. They cannot get into the parties' heads. Nor do they have time machines that will let them go back and figure out what the parties were thinking at a particular point of time. In deciding what the contract's terms are, what the terms mean, and what the terms require the parties to do, judges are basing their decision wholly on objective factors and criteria, and on how a reasonable person in possession of the facts would interpret the significance of the parties' words and deeds.

The legal rules and tests you will study in this part are therefore framed cautiously, to insulate judges from the temptation of rewriting a contract to 'fix' the problems it has or to make it more fair to both parties. They are also framed pragmatically, to yield sensible results even when the

courts are working on the basis of an objective, rather than subjective, reading of the terms of the contract. A number of the rules we will study in this part will make much more sense if you keep these two considerations in mind as you work your way through the law.