Podcast 4: Enforcing contracts

This podcast will introduce you to the key themes and topics covered in Part IV of this book. Our focus so far has been on the *substantive* dimensions of contract law. We have examined how the law determines whether contracts have come into being, and what they require the parties to do. We have also looked at the legal rules that set boundaries on freedom of contract, by regulating the bargaining process as well as the substantive terms of the contract. In this Part, our focus is on the *remedial* dimensions of contract law. Parties enter into contracts to create not just any obligation, but an enforceable legal obligation. The idea that contracts are about enforceable legal obligations runs through every aspect of the law of contract. We see it in the importance to formation of the intention to create legal relations; in the test for whether something is a term, a representation, or puffery; in the requirement that terms must be certain; in the content of statutory implied terms; and so on. What, however, does enforceability mean? What happens if one of the parties breaches the contract? What legal recourse does the other party have? What will the law do for persons affected by the breach of a contract? That is what the chapters in this Part study.

The issues we will discuss in this Part are of considerable practical importance. This is not because breach of contract is common. It is, in fact, rare for a contract to be breached. Contracts are made to be kept, and in the vast majority of cases they are kept. Nevertheless, breach can and does happen. Circumstances change. Contractual commitments that seemed perfectly reasonable and sensible at the time of contracting may seem infeasible, or onerous, or unprofitable a few months later. A central task of the law of contract is to provide a backstop in such cases. Consider an example. You've engaged a company to print two hundred custom T-shirts for a student event. The company's machine breaks down, and the T-shirts are not ready on time. It is in situations like this that the contract law's role as a backstop to enforce contracts becomes important. The task of contract law, in such cases, is to determine whether the contract has been breached and, if so, what remedy might be granted to the innocent party.

Discharging this task is not always straightforward, and English law's general approach reflects two broad principles. The first is that contracts can be breached without either party being at fault. The example we have just discussed—the contract to print custom T-shirts—is a case in point. The company's failure to print the T-shirts on time may not have been its fault. Even well-maintained machines will occasionally break down. Contracts like this may be breached despite a party having tried its best to perform its obligations under the contract. English contract law deals with this issue by taking a relatively stringent approach to performance. Contract law requires strict compliance with contractual obligations. Parties must perform their obligations under a contract in accordance with the terms of the contract. If they fail to do so, they are liable for breach of contract. Whether they are at fault is irrelevant when it comes to determining whether they are in breach. The only thing that matters is whether they performed their obligations to the standard set out in the contract itself. If the contract requires a party to achieve an outcome, then the fact that that party did its best to achieve it is not good enough if it in fact failed to achieve it.

The second broad principle relates to the idea of enforcement itself, which is more complicated than it may at first sight appear to be. In English law, 'enforcement' does not usually mean enforcement in the literal sense. Courts do not, except in very rare circumstances, respond to breaches by requiring parties in breach to actually perform their contractual obligations. Instead,

the most common remedy a court will grant is compensation. The court will, in essence, order the party in breach to pay compensation to the victim of the breach, to make good the loss suffered. Compensatory damages are not the only remedy available at law, but they are by far the most commonly granted remedy. The emphasis on compensatory damages reflects the fact that contract law does not seek to punish a party for having failed to keep its word. Its role is to protect the innocent party against loss, not punish the party in breach. The four chapters in this Part explore in some depth how these two principles—of strict performance, and of remedies oriented towards compensation rather than punishment—are reflected in the rules of contract law which deal with the consequences of breach of contract.

Chapter 15 takes up the question of how English law defines breach, and its approach to the effect of breach on the contract. Can breach ever be excused or justified? Are small breaches also breaches? And how does breach affect the obligations of other parties to the contract? Can a party walk away from a contract just because it has been breached? Consider, once again, the example of an order for custom T-shirts for a student event. Does a delay in getting the T-shirts ready entitle you to cancel your order? Does the length of the delay matter? Are there other factors that matter? These are the questions we will examine in Chapter 15. As we will see, the answers to these questions reflect both principles we have discussed—that contracts must be performed in strict accordance with their terms, and that the legal consequences of breach must be compensatory and not punitive.

Chapters 16 and 17 turn to the issue of the remedies a party has if a contract is breached. In Chapter 16, we examine how the law approaches compensatory damages. There is no single, objectively correct way of reducing the loss breach has caused to a party to a definite sum of money. How, for example, can a student society be compensated for its supplier's failure to print T-shirts on time for a major event? What sum of money could reasonably be said to compensate the society for a breach of this type? In practice, the law uses a range of different techniques, or 'measures', to try and arrive at a justifiable figure which compensates the innocent party without becoming punitive against the party in breach. Chapter 16 discusses these, and the types of circumstances in which they are used.

Chapter 17 takes up the issue of non-compensatory remedies—that is, remedies that are awarded for a purpose other than compensation. Although damages are the default remedy, the court also has the discretion to award other remedies, such as an order of specific performance or an injunction, both of which require the party in breach to put an end to the breach and perform its obligations under the contract. Chapter 17 examines these remedies and the circumstances in which they are granted in more detail, and also looks at other, more controversial, remedies that have been awarded in a small number of recent cases.

Chapter 18 considers the remedies available to third parties—that is, persons who are not party to the contract that has been breached, but have suffered loss as a result of the breach. Could, for example, an individual student disappointed by not getting a custom T-shirt sue the supplier? Although the general rule is that only parties to a contract are entitled to remedies for its breach, there are a number of exceptions to this rule, which this chapter will discuss in more detail.

A general point you should keep in mind when reading the chapters in this Part is that legal remedies for breach do not represent a moral reaction to the fact that one party has failed to keep its word. Rather, the aim of the law is both more modest and more practical. The law's

aim is simply to let people rely on contracts by giving them some assurance that if a contract is breached, they have a right to compensation in law. The rules you will study in this Part will make much more sense if you approach them with that idea in mind.