



Chapter 22

Additional chapter: Capacity

22.1 An adult of sound mind has full contractual capacity, although he or she may still be able to claim that the contract is not enforceable on some other basis—undue influence, for example. The law recognizes the general incapacity to contract of minors and the mentally incapacitated. It also recognizes that it is desirable for there to be some degree of binding obligation in relation to some contracts to enable those persons to procure certain essentials.

22.2 The question of contractual capacity also needs to be briefly considered in the context of companies.

22.3 Incapacity raises a tension in the law between the need to protect someone who is incapacitated (or, in the case of a company, its shareholders) and the desire not to treat too harshly the person dealing fairly with the incapacitated person.

Minors

22.4 An individual is a minor until the age of 18. The basic rule of the incapacity of minors became of much less significance once the relevant age was reduced to 18 from 21 by s 1 of the Family Law Reform Act 1969. (The earlier law referred to ‘infants’, but ‘minors’ is now the preferred terminology.) The basic rule is that a minor is not bound by any contract which he or she makes, although the person contracting with him or her will be. However, upon attaining his or her majority a minor may ratify a contract which is otherwise not binding upon him or her. In addition, there are certain contracts which have some legal effect upon the minor despite his or her general lack of capacity. He or she is bound by contracts for necessities, and employment and analogous contracts. There are also four types of contract, referred to as ‘voidable contracts’, which are binding upon the minor until repudiated by him or her before he or she reaches majority or within a reasonable time of doing so.

Necessaries

22.5 Contracts to provide minors with ‘necessaries’ form the main exception to the general lack of capacity to contract. A minor will have to pay a reasonable price for a ‘necessary’ if the contract is generally beneficial to him or her. It is for the party claiming to have contracted with the minor to establish that the contract is a contract for necessaries (*Nash v Inman* (1908)).

22.6 Necessaries include goods and services. To some extent it is obvious what can be considered to constitute necessaries: contracts to provide food, drink, clothing, and education are within this category. In *Chapple v Cooper* (1844) 13 M & W 252 it was held that a contract made by a minor for the burial of her deceased husband was a contract for necessaries. However, whether the contract is for necessaries is not decided on the objective basis of the requirements for living of an entirely abstract, reasonable, minor. The test is relative: it is dependent upon the age and social situation of the particular minor:

Things necessary are those without which an individual cannot reasonably exist. In the first place, food, raiment, lodging and the like. About these there is no doubt. Again as the proper cultivation of the mind is as expedient as the support of the body, instruction in art or trade, or intellectual moral and religious information may be necessary also . . . Then the classes being established, the subject matter and extent of the contract may vary according to the state and condition of the infant himself. His clothes may be fine or coarse according to his rank; his education may vary according to the station he is to fill . . . But in all these cases it must be made out that the class itself is one in which the things furnished are essential to the existence and reasonable advantage and comfort of the infant contractor. Thus articles of mere luxury are always excluded, though luxurious articles of utility are in some cases allowed’ (per Alderson B at 258).

22.7 In relation to the sale of goods this relativity of requirements is reflected in Sale of Goods Act 1979, s 3(3) which states that ‘necessaries means goods suitable to the condition in life of the minor . . . and to his actual requirements at the time of sale and delivery’. Examples of this relative approach to necessaries can be found in *Peters v Fleming* (1840) and in *Clyde Cycle Co. v Hargreaves* (1898). In *Peters v Fleming* the minor was an undergraduate whose father was ‘a gentleman of fortune and a Member of Parliament’, and in those circumstances a breast pin and a watch chain were considered to be necessaries. In *Clyde Cycle Co. v Hargreaves*, a racing bike was seen as a necessary. In that case:

Mr Hargreaves was a young man of 19 apprenticed to a scientific instrument maker and earning 21s a week. He lived with his parents. The bicycle cost £12 10s. Hargreaves used the bicycle for racing and won several prizes. He occasionally used it on the road; a roadster bike of similar quality with the usual accessories would have cost slightly more.

The court thought that had Mr Hargreaves purchased a horse the contract could not have been one for necessaries but, as the use of bicycles was common in his neighbourhood by someone in his position, the bicycle could be considered to be a necessary.

22.8 It is clear that the question of whether a contract is for necessaries is not an abstract test, even within the limits of the minor's social circumstances. It is dependent upon the minor's needs at the time of the contract. What might be a necessary one week may not be the next, if the particular need has been satisfied in the meantime. This is so even where the person contracting with the minor is unaware that his or her needs have been satisfied by another source (*Barnes & Co. v Toye* (1884)). The burden of proof rests with the party claiming that the contract was for necessaries. In *Nash v Inman* a contract for the purchase of clothes, including 11 waistcoats, was held not to be a contract for necessaries, even for a Cambridge undergraduate. The minor's father had given evidence that he had been well supplied with suitable clothing when going up to Cambridge. The supplier did not produce any evidence to show that that was not the case.

22.9 The person contracting with a minor to supply necessaries cannot rely upon that fact if the contract terms are harsh or onerous and the contract, as a whole, is not beneficial to the minor. In *Fawcett v Smethurst* (1914) a minor made a contract for the hire of a car. Under the circumstances it was capable of being a contract for a necessary. The minor crashed the car without any fault on his part. The owner tried to allege that the minor was liable. He claimed that it had been a term of the contract that the car was entirely at the minor's risk. The court did not accept that there was any such term, but held that, if there was, it would have prevented the contract from being enforceable against a minor. Even a contract for necessaries cannot be enforced unless it is generally beneficial to the minor. Such an onerous term as that discussed in *Fawcett* would have removed the contract from the 'generally beneficial' category (see also *Flower v London and North Western Rly Co.* (1894)).

22.10 Even in relation to necessaries, the minor does not have to pay the contract price, but merely a reasonable price. If the contract is for the sale of goods, that is stated by the Sale of Goods Act 1979, s 3(2) which says, 'Where necessaries are sold and delivered to a minor . . . he must pay a reasonable price for them'. The requirement of payment of a reasonable price, rather than the contract price, leads to the suggestion that the minor's obligation is not a matter of contract at all but simply an obligation founded on the benefit which he or she has received. On that basis, there would be no liability for the minor on a purely executory contract. (The suggestion is reinforced by the reference in s 3(2) to necessaries 'sold and delivered'.) In *Nash v Inman* [1908] KB 1, Buckley LJ regarded it as a matter of contract, but Fletcher Moulton LJ saw the action as based upon what the minor had received, rather than upon the agreement itself. He said (at 8): 'Its real foundation is an obligation which the law imposes on the infant to make a fair payment in respect of needs satisfied.' This suggests that enforcement of payment against the minor is a matter of restitution rather than contract, and Fletcher Moulton LJ's approach precludes any claim against a minor on an executory contract. However, a minor had to pay damages on such a contract in *Roberts v Gray* [1913] 1 KB 520. In that case:

The minor, Gray, was to join Roberts on a world tour playing billiards. Roberts was a noted professional billiard player. Gray was to learn from him. Roberts was to pay all the expenses and to be reimbursed out of money made on the tour. Roberts incurred expenses in making

arrangements for the tour. When the contract was still largely executory, they fell out over the type of billiard ball to be used. Gray refused to continue with the contract.

The court held that Roberts could recover damages in the usual way. The contract was regarded as relating to the minor's education, and therefore as a contract for necessities. The fact that it was largely executory did not prevent Roberts's recovery. Hamilton LJ said (at 530):

I am unable to appreciate why a contract in itself binding, because it is a contract for necessities not qualified by unreasonable terms, can cease to be binding merely because it is still executory.

Employment and analogous contracts

22.11 It is obviously a good idea that a minor should not be prevented from earning a living, if he or she is of an appropriate age to do so. On that basis, the courts have recognized the enforceability of contracts for the employment of minors and analogous contracts. This is subject to the qualification that the contract must, as a whole, be beneficial to the minor. In *Clements v London and North Western Rly Co.* (1894):

The minor, Clements, was employed by the railway as a porter. Under the contract of employment, he had given up his right to claim for personal injury under the Employer's Liability Act 1880 but had, instead, acquired rights under an insurance scheme. Although, under the insurance scheme, the payments were generally lower, it did not require the injury to have resulted from the employer's negligence. Clements was injured and claimed under the 1880 Act.

It was held that the contract as a whole was beneficial to Clements. He was bound by it and could not claim under the 1880 Act.

22.12 In contrast, the contract was not generally beneficial to the minor, and was not binding, in *De Francesco v Barnum* (1890) 45 Ch D 430. In that case a girl contracted with Signor De Francesco to be taught to dance. The contract bound her to him for seven years. During that time he did not have to maintain her, or pay her, unless he obtained engagements for her, and then the rate of pay was very low. She was not to obtain engagements for herself, or marry, without his consent. Signor De Francesco could terminate the contract at any time. The contract was held not to be binding on the girl. Its terms were unreasonable and not for her benefit. In general, in considering whether the contract is beneficial as a whole, the specific terms will be compared with the usual terms in the particular type of employment (*De Francesco v Barnum* at 442; *Sir WC Leng & Co. Ltd v Andrews* [1909] 1 Ch 763 at 769).

22.13 The courts have been prepared to find that contracts which are analogous to contracts of employment are effective (for example, the sale by a writer or composer of the copyright in his works). A contract between the 15-year-old Wayne Rooney and an 'executive agent' to carry out 'personal representation' in respect of 'all his work as a professional football player' was not

regarded as analogous. He had already been engaged by Everton as a trainee and under Football Association rules could not become a professional football player until aged 17 (*Proform Sports Management v Proactive Sports Management* (2006)). Again any contracts which are regarded as analogous to employment contracts must be generally beneficial to the minor (*Chaplin v Leslie Frewin (Publishers) Ltd* (1966)). In *Doyle v White City Stadium Ltd and British Boxing Board of Control* (1935) Jack Doyle, a minor who was a professional boxer, had been granted a licence by the British Boxing Board of Control. Such a licence was necessary for someone to earn his living as a professional boxer. For the fight in question, the Board deprived him of his purse for breach of its rules. It was held that it was able to do so. The contract for the licence was analogous to a contract of employment and, on the whole, the rules were beneficial to the minor.

22.14 Although contracts of employment and analogous contracts are binding on a minor, a trading contract made by a minor is not. If a minor has a business, a contract made in the course of that business is not considered enforceable. In *Mercantile Union Guarantee Corp v Ball* (1937), a 20-year-old minor, with a haulage business, was not bound by a contract for the hire purchase of a lorry for his business. The contract was not considered to be of a type which could be enforced against a minor and, in any event, the terms were not beneficial to him. Trading contracts may be seen as presenting a risk to the minor which is not present in a contract of employment (*Whywall v Champion* (1738): ‘the law will not suffer him to trade, which may be his undoing’).

Voidable contracts

22.15 There are four types of contract, commonly referred to collectively as ‘voidable contracts’, which bind both parties unless the minor repudiates them. The minor can repudiate before he or she attains majority or within a reasonable time thereafter (*Edwards v Carter* (1893)). The contracts are:

- contracts relating to an interest in land (a minor can no longer hold a legal estate in land— Law of Property Act 1925, s 1(6));
- marriage settlements (for example, *Edwards v Carter* (1893));
- the purchase of, or subscription for, shares (*Steinberg v Scala (Leeds) Ltd* (1923));
- partnerships (for example, *Goode v Harrison* (1821)).

These contracts will bind both parties unless the minor repudiates. The repudiation relieves the minor of future liabilities. The position is not clear as regards liabilities which have arisen but not been discharged (*North Western Ry v M’Michael* (1850) 5 Exch 114 at 125; *Blake v Concannon* (1870)). It has been held that any money already paid under one of these contracts which has subsequently been repudiated by the minor cannot be recovered unless there has been a total failure of consideration. In *Steinberg v Scala (Leeds) Ltd* (1923) a minor was allotted shares in a company. Her later repudiation meant that she was not liable for future calls, but she could not recover sums she had already paid. She had received the shares which she had contracted to receive and there was no total failure of consideration (*Corpe v Overton* (1833)). However, it has been argued that a requirement of total failure of consideration is inappropriate. The incapacity

itself should furnish sufficient basis for restitution provided that *restitutio in integrum* is possible, i.e. provided that the other party can be restored to his or her original position (*Valentini v Canali* (1889)—see Goff and Jones, *The Law of Unjust Enrichment*, 9th edn, Sweet & Maxwell, at 24.22–24.25).

Ratification

22.16 If a contract with a minor does not fall within one of the exceptional situations above, it is not binding upon the minor. It is binding upon the other party, but the minor is unlikely to succeed in an action for specific performance, unless he or she has already performed his or her side of the agreement, because of the lack of mutuality (*Flight v Bolland* (1828)). However, even if the contract is not within one of the special cases, it may become binding upon a minor if he or she ratifies it, expressly or impliedly, upon attaining his or her majority. Ratification could occur at common law (*Williams v Moor* (1843)), and the repeal of s 2 of the Infants Relief Act 1874 by the Minors' Contracts Act 1987 means that it is, again, generally available.

22.17 Before ratification, the minor will not be bound. Again it would seem that recovery by the minor of any property transferred under the 'contract' is possible only to the extent that an adult would be able to do so, for example, if there has been a total failure of consideration. Again it has been argued that restitution should be available simply on the basis of the incapacity (see para. **22.15**).

Restitution—from the minor

22.18 A minor may have received property under a 'contract' which is not binding upon him or her. Section 3 of the Minors' Contracts Act 1987 gives the court a discretion to order the return of the property, or property representing it, where it is 'just and equitable' so to do. Section 3(2) preserves the restitutionary actions for the recovery of the property although the wording is rather obscure. The courts have tried to avoid effectively enforcing the contract through the restitutionary actions, and the statutory discretion should be exercised with that in mind (see, for example, *R Leslie Ltd v Sheill* (1914)), but it may be argued that they have too readily seen incapacity as a defence in that way.

Tort

22.19 A minor can be liable in tort, but a tortious action will not succeed where it would amount to enforcement of a contract by which the minor is not bound. In *R Leslie Ltd v Sheill* (1914) a minor obtained a loan by fraudulently misrepresenting his age. The creditor could not recover damages for deceit; otherwise the effect would have been that the court was enforcing a contract which was not binding on the minor.

22.20 It may be difficult to decide when the tort claim is sufficiently closely connected to the contract to prevent its success. In *Jennings v Rundall* (1799) a minor who hired a horse, 'to be moderately ridden', could not be liable in tort for the injury caused by his improper riding of it. He was not bound by the contract and the tort action was too closely linked to the contract. Lord

Kenyon said, 'If it were in the power of a plaintiff to convert that which arises out of a contract into a tort, there would be an end to that protection which the law affords to infants.' However, in *Burnard v Haggis* (1863) the minor was liable in tort. He had hired a horse, and had been expressly told that the horse was not let out for jumping and that it was more expensive to hire a horse for jumping. The horse died from being impaled on a stake while trying to jump a fence. The minor was held liable in tort.

Guarantees of contracts made by a minor

22.21 Section 2 of the Minors' Contracts Act 1987 makes it clear that a contract guaranteeing a contract made by a minor is not ineffective simply on the basis of the minor's lack of capacity in relation to the main contract.

Mental incapacity and intoxication

22.22 Section 2(1) of the Mental Capacity Act 2005 assumes that a person has capacity unless it is established that is not the case. A person lacks capacity 'in relation to a matter if at the material time he is unable to make a decision for himself in relation to the matter because of an impairment of, or disturbance in the functioning of, the mind or brain' (s 2(1)). A reasonable price must be paid for necessary goods or services supplied to the incapacitated person (s 7).

22.23 At common law the contract is binding unless the person claiming incapacity can establish, first, that he or she did not understand what he or she was doing and, second, that the other party knew that to be the case. In *Imperial Loan Co. v Stone* [1892] 1 QB 599, Lord Esher said (at 601):

When a person enters into a contract and afterwards alleges that he was so insane at the time that he did not know what he was doing, and proves the allegation, the contract is as binding on him, in every respect, whether it is executory or executed, as if he had been sane when he made it, unless he can prove further that the person with whom he contracted knew him to be so insane as not to be capable of understanding what he was about.

22.24 The contract may be binding and enforceable upon a person of unsound mind if knowledge of the impairment is not proven, as in the case of *Hart v O'Connor* [1985]. Here an agreement, with an elderly man suffering with dementia, for the sale of land, was not set aside on the ground of incapacity because the defendant buyer was unaware of the vendor's lack of capacity. The claimants, who were members of the man's family, were not entitled to have the transaction set aside; a decision which has not been without controversy given that the responsibility for proving the other party's knowledge of mental impairment rests with the individual sufferer.

22.25 However, even in the absence of a successful claim of incapacity, as such, a contract may be voidable for undue influence, for example (see **Chapter 14**).

22.26 It should be possible for ratification to take place if the mental incapacity ceases (*Matthews v Baxter* (1873)).

22.27 The individual who becomes so intoxicated that he or she does not understand what he or she is doing will have to pay a reasonable price for necessaries (see Sale of Goods Act 1979, s 3(2)). Other contracts will not be binding if he or she did not understand what he or she was doing and the other party knew that to be the case (*Gore v Gibson* (1843); *Matthews v Baxter*).

Companies created under the Companies Acts

22.28 A company is a legal person, separate from its shareholders or directors (*Salomon v Salomon & Co. Ltd* (1897)). The question of a company's capacity to make a particular contract used to depend upon its constitution. If the contract was outside the scope of its constitution, then it was ultra vires and void. Although designed to protect the shareholders and creditors of a company, the ultra vires rule caused difficulty and hardship for those contracting with a company. As regards good faith outsiders to the company the ultra vires rule has now, effectively, been abolished and from their perspective the company will not lack capacity (Companies Act 2006, ss 39, 40). A company's capacity, and the question of ultra vires, will still be relevant to matters internal to the company. It will still be relevant when considering the relationship of shareholders and directors.

Summary

- An individual is a minor until the age of 18.
- The general rule is that a minor will not be bound by a contract, although the other person will be. However, on becoming 18 a minor may ratify a contract made before that date and it will then be binding on him or her. In addition there are some contracts which may have some legal effect upon the minor:
 - contracts for necessaries and employment and analogous contracts;
 - four other types of contracts (contracts relating to an interest in land, marriage settlements, purchase or subscription for shares, partnerships).
- Mental incapacity is defined by the Mental Capacity Act 2005.
- Under s 7 a reasonable price must be paid for necessary goods or services supplied.
- At common law a contract is binding unless the incapacity and knowledge of it on the part of the other party is established.
- A company's lack of capacity to make a contract under its constitution will not now affect a good faith outsider to the company, contracting with the company (Companies Act 2006, ss 39, 40).

Further reading

A. H. Hudson, 'Mental Incapacity Revisited' [1986] Conv 178–86