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## History of Contract Law

- Arises during the industrial revolution, when business is starting to evolve
- at end of feudal age, the working people were indentured surfs
- \*during the industrial revolution, surfs moved to cities and could choose employer
- Freedom of exchange evolves out of this, newfound equality, free-markets
- Courts decide to enforce activities that involve “exchanges”
- \*exchange involves on person giving something to, or doing something for another person
- \*courts would only step in when there was a breach of these promises
- Doctrine of Consideration is driven by ideas surrounding human interactions
- \*says that when something is given in exchange for a promise, it should be enforced because there exists “consideration” for that promise
- Courts shouldn’t be concerned with justice or fairness or morality, simply with the fulfillment of promise deemed enforceable
- In post-WW2, political-economy begins to change...state is seen to play a larger role, ensures fairness, limit externalities
- Movement begins to make contract law less formal, more concerned with morality/fairness

## Nature of Consideration

- Legal detriment = giving something up = 3 ways to do that, you as the promisee can 1)give the promisor something to which you are legally entitled 2)you are doing something you are not legally required to do
- 3) Promising to refrain from doing something they have a legal right to do

## Thomas v Thomas

### Issue

- Whether the promise made to Elanor had consideration in the form of John’s wish, and Sam/ Bob’s intention to carry this wish out

### Ratio

- Promisee= Ben/Sam
- \*Promisor = Elanor
- Promise = You can have the house
- \*Consideration- 1 pound rent
- Judge found consideration in the rent payed by Elanor
- \*expressed that “consideration is not a moral obligation, but something of value in the eye of the law”
- \*\*\*Demonstrates that consideration need only be adequate, not sufficient\*\*\*
- \*\*\*Court does not care about motive, simply cares about validity of promise\*\*\*
- \*\*\*Form of contract is more important than substance\*\*\*

## Past Consideration

### Eastwood v Kenyan

### Issue

- Can a promise be made retroactively of consideration?

Ratio

-In this case, the money spent on Sarah happened before the promise that Kenyan would pay Eastwood back

-Court suggests that while Kenyan promised to pay Eastwood back, there was no consideration to do so because the consideration was retroactive

\*Kenyan's sentiment does not constitute consideration ala *Thomas*

-Deems that past consideration is not valid for a current bargain

-Even if Sarah was the plaintiff, it would not hold because there was no request made by Sarah

\*consideration was given with no request or promise

\*\*\*Past consideration is not good, holding promises made with good intention would wreak havoc on the judicial system\*\*\*

**Lampleigh v Brathwait**Issue

-Can past consideration be valid for a current promise?

Ratio

-Court agreed that a voluntary courtesy was not enough to constitute a promise

-However, if it were moved by a request then it will bind the contract

\*Even if the promise proceeds the consideration, it is considered coupled with the request made presumptively (implied promise if a reasonable person would expect something in return for consideration)

\*\*\*This differentiates from Eastwood v Kenyan because there is request present\*\*\*

**Pre-existing Legal Duty****Stilk v Myrick**Issue

-Whether there is consideration in the new bargain between the sailors and captain?

Ratio

-If sailors/ captain could show that there was a ripping up of old contract, and make a new contract. This contract is good

-As sailors were contracted to finish the voyage no matter what, they were sacrificing no more legal detriment when they made the second bargain, and therefore there was no consideration for the second bargain

\*There is a policy concern underlying this case which is that this is some form of economic coercion\*

\*\*Perfect example of what "to give a legal detriment" is, as given that they had already sold their legal rights not to work that ship, they had nothing left to give back\*\*

**Gilbert Steel Ltd v University Const. Ltd**Issue

-Was there consideration for the second bargain to be treated as a valid contract

Ratio

-Judge found the agreement was void for a lack of consideration

- \*Was heavily influenced by the fact that the parties had indicated that they were capable of making a legitimate new contract, and then on the 2nd instance, they didn't do that
- \*in the second scenario, this was not the case, so finds that there was no new contract, only an extension of the old contract...not valid consideration
- \*\*\*Suggests that if they can prove there was a new contract, then the consideration issue isn't a problem\*\*\*
- \*\*\*Also enshrines principle that reliance is not consideration\*\*\*

### **Williams v Roffey Bros & Nicholls Ltd.**

#### Issue

-Did the second contract, to pay Williams more money, have consideration?

#### Ratio

- Judge suggests that in 20th century, courts should abandon rigid contract structure in favour of looking at the intention to contract
- \*Contract law needs to be flexible to adapt to changing society, must be pragmatic
- \*see consideration in situations where bargaining power is equal
- In this case, judge finds that there was consideration in the fact that the defendants benefitted from the housing project being completed so that they didn't have to pay a fine to the housing company, nor did they have to engage in the money, search costs of finding another contractor to finish the work
- Statement of principle: where there are benefits derived by each party to a contract of variation, even though one party did not suffer a detriment, this would not be fatal to the establishing of sufficient consideration to support the agreement
- Courts suggest that it is crucial that there also be a meeting of the minds
- \*\*\*Breaks the *Stilk* precedent, paves the way for advances to Contract flexibility and structure\*\*\*

### **Greater Fredericton Airport Authority Inc. v Nav Canada**

#### Issue

-Did the promise by the Airport Authority to pay for the equipment constitute a legally binding agreement?

#### Ratio

- Presumption of the court is that Nav Can is probably responsible for paying for the new equipment, or securing federal funding for the equipment
- \* Was not the obligation of the Fredericton Airport to pay for this
- \*When they promised to pay for this, they were promising to do something they weren't required to pay for
- Pre-existing legal obligation is for Nav Can to pay for this, and Greater Fredericton Airport Authority would be paying more for a pre-existing legal obligation
- \*Therefore, if this was a *Stilk* and *Myrick* issue, then there would be no fresh consideration
- However, *Williams* and *Roffey* exists, and that in Canada we should accept *Williams* and *Roffey*
- Thus, finds that there is a binding agreement based on the fact that the airport gained a benefit by paying for the new equipment

-However, says that the agreement is made under economic duress:

- 1) Nav Can exerted pressure upon the Airport Authority to get what they want  
\*Say they won't proceed, and will leave Fredericton with a non-functioning airport
- 2) Airport Authority had no choice but to capitulate to Nav Can's demands

### **Foakes v Beer**

#### Issue

-Is payment of a principle valid consideration for a promise not to pay interest?

#### Ratio

-It is argued that it could be as "a bird in the hand is better than two in the bush"

-Judge considers the fact that the 500 pounds paid upfront could be consideration

\*Doctrine established by *Pinnel's Case* is "that payment of a lesser sum on the day in satisfaction of a greater, cannot be any satisfaction for the whole, because it appears to the Judges, that by no possibility a lesser sum can be a satisfaction to a plaintiff for a greater sum

\*\*\*Court implies classic sense of consideration = no legal detriment from this, as the repayment was a pre-existing legal duty\*\*\*

### **Waiver and Promissory Estoppel**

#### **Central London Property Trust Ltd. v High Trees House Ltd**

#### Issue

-Was agreement to reduce payments during the war valid?

#### Ratio

-Judge says that there is probably no consideration in the promise

\*Remarks that recently courts have upheld promises that were intended to create legal relations, that the party making the promise believed that the promise was going to be acted upon by the other party

-Denning says that if a promisee relies upon a promise, that both parties believe will be enforced, and is enforced for a time, that the promise should be enforceable

-Reliance is inferred by the court that when a contract is significant enough that there is a serious business implication from this

\*\*A promise intended to be binding, intended to be acted on and in fact acted on, is binding so far as its terms properly apply (there is also a reliance aspect)\*\*

### **John Burrows Ltd. v Subsurface Surveys Ltd**

#### Issue

-Did burrows imply, by allowing late payments, to allow late payments as a modification of the prior terms of the agreement

#### Ratio

-Court suggests that there must be evidence from which it can be inferred that the first party intended that the legal relations created by the contract would be altered as a result of the negotiations

-not good enough to show that one party has taken advantage of indulgences granted to him (as this would require parties holding promissory notes to enforce them to the letter

-In this case, the judge says that there is no evidence to warrant the supposition that there was any attempt to negotiate the firm terms of repayment schedule

### **D&C Builders Ltd v Rees**

#### Issue

-Was the taking by D&C of a lesser sum instead of no sum at all a binding agreement?

#### Ratio

-There was no consideration, this was a case of a post-contractual modification a la foakes v beer

-However, courts will not enforce original contracts where it would be inequitable having regard to the dealings which have taken place between the parties

\*References *Hightrees*, says that creditor cannot attempt to collect where there has been a post-contractual modification to which the creditor and debtor have agreed and it would be inequitable to hold original terms of agreement

-must be a true accord, under which the creditor voluntarily agrees to accept a lesser sum in satisfaction, and the debtor acts on that accord by paying a lesser sum

-Judge in this case finds that there is no true accord

\*economic duress, putting undue pressure on the credit in a way which she had no right to do

-No equity to be found in holding the plaintiff to the new terms of the contract

\*\*\*Must be a true accord to initiate promissory estoppel, this prevents duress where promisor has been forced into modification by duress\*\*\*

### **Post Chaser**

#### Issue

-Is this a case of promissory estoppel? Is there the necessary degree of reliance?

#### Ratio

-Did the buyers' message to the sellers constitute an unequivocal representation that they did not intend to enforce their strict legal right to reject the seller's tender of documents

\*judge found that there was reliance by the buyers on the shipment (through a debit of price differential), and that this constituted a waiver as they intended on allowing the shipment regardless of the breach in the contract

-Was there enough reliance in the 2 days between the post-contractual modification and the contract cancellation to render it inequitable

\*principle: to establish the inequity of enforcing the original terms of the contract it is not necessary to show detriment, can still be inequitable at least without reasonable notice, for the representor to enforce his legal rights

-simply is enough that the promisee planned his economic affairs around the newer terms

\*judge says that nothing about the actions of the sellers, nor the time frame involved, that would make it inequitable to enforce the original terms of the contract

\*\*\*2 ways that you can find inequity: 1) If common sense dictates that the party that is in the sellers position most likely would have acted in a way that would make it harmful and difficult if the representation was not enforced

2) Not obvious reliance, burden is on promisee to show that in light of the representation, there was reliance that would make it inequitable for the court not to enforce the contract\*\*\*

### **Petridis v Shabinsky**

#### Issue

-Is this a situation of promissory estoppel? Can doctrine be used by plaintiff rather than defendant?

#### Ratio

-What makes this different from high trees is that the restaurant owner took the action

\*but this is only procedural, not really substantive

-Says that the landlord had the ability to either end extension, or to waive their right to this, and continue to negotiate

\*this is a situation of the latter

-Finds that it would be inequitable to hold the tenant to the original terms as the plaintiff was made to vacate the premises so quickly

\*example of how promissory estoppel can be used as a “sword”\*

### **Robichaud v Caisse Populaire de Poulemouche Ltee**

#### Issue

-Is this a case of promissory estoppel?

#### Ratio

-Estoppel is a grounds for defence, not for an action

-Allows appeal as he finds that it would be against the principles of equity to only allow estoppel to be used as a defence and not as a cause of action when the result is inequitable

\*\*Again, another case of the improper use of the sword shield distinction\*\*

### **Combe v Combe**

#### Issue

-Whether promissory estoppel can be used as a sword?

#### Ratio

-Wife's reliance is that she didn't go to court to get a maintenance order for the payment of the promise

\*There was no consideration because there was no request for the wife not to go to court to collect on the maintenance order

-Plaintiff says this is the same as high trees, and that she deserves payment from hubby

-Denning suggests that the doctrine of promissory estoppel is not meant to cause new actions, only to prevent a party from insisting upon his strict legal right when it would be unjust to allow him to enforce them, having regard for the way the dealings which have taken place between the parties

\*it may be a part of a cause of action, but not the cause of action in itself

\*in this case, the promisor is undertaking to do something new, and if promissory estoppel is used in this case it will serve as a cause of action, and not as a defence against an unjust contract modification

\*\*Nips promissory estoppel in the bud, and outlines true sword/shield distinction\*\*



## **Waltons Stores (Interstate) Pty Ltd v Maher**

### Issue

-Is the Appellant estopped from denying the existence of a binding contract that it would take a lease of the respondents' premises, and, if so, whether the respondents can support the order made by the primary judge, that the appellant pay to the respondent damages in lieu of specific performance of an agreement for a lease

### Ratio

-No Consideration: Walton did not request Maher to begin excavation

-Estoppel being used as sword because Waltons didnt have to enter into lease

-Court then expresses its want to limit the freedom of economic actors from acting so unconscionably

\*Mere reliance is not sufficient in the case: needs 1)encouragement of the assumption that a contract will come into existence or the contract will be preformed needs to be present

-the "or" here is really important because it seems to apply to any promise that someone relies upon

2) that the party relied to its detriment, and that the other party knew that the other party was relying to its detriment

-Court finds that Walton was under an obligation to tell Maher, after hearing that Maher was relying detrimentally, it was unconscionable for Walton to not clarify its intention

\*\*\*6 part test: 1)Plaintiff assumed or expected that a particular legal relationship exists between the plaintiff and the defendant or that a particular legal relationship will exist between the plaintiff and the defendant, defendant is not free to withdraw from the expected legal relationship

2)Defendant has induced the plaintiff to adopt that assumption or expectation

3)Plaintiff acts or abstained from acting in reliance on the assumption or expectation

4)Defendant knew or intended him to do so

5)Plaintiff's action or inaction will occasion detriment if the assumption or expectation is not fulfilled

6)Defendant has failed to act to avoid that detriment whether by fulfilling the assumption or expectation or otherwise\*\*\*

## **M. (N) v A. (AT)**

### Issue

-Can there be promissory estoppel when no pre-existing legal relationship exists (A la Waltons)?

### Ratio

-Narrow interpretation focuses on the facts, and only when the facts are met will they follow *Waltons*

\*difference from Waltons is that there was no promise to enter legal relations

-Judge finds that there is no evidence that M intended his voluntary promise to pay the balance outstanding on A's mortgage, nor that A thought the promise was binding

-Therefore, there is no promissory estoppel, as there was no belief that there was a legally binding promise

\*\*\*BCCA defines the test as requiring there to be an intent to form a legal relationship between the parties (also doesn't like dealing with marriage)\*\*\*

\*\*Limits the case from Waltons to what is on the left side of the "or"\*\*\*

## **Third Party Beneficiaries**

### **Trusts**

-A can give something to B, to hold onto it for C (through a trust)

\*Beneficiary is empowered under a trust to sue both the trustee and the settlor (person giving the benefit to the trustee [A]) to get the benefit

-A gives C a bushel of Carrots, B gives 10 dollars to A

\*B intends to hold the benefit of this promise in trust for C

\*you must be able to show this intention of B to hold the benefit in trust for C, if C will be allowed to go after either party for the benefit if it is not delivered

\*trust is an equitable device, there is no consideration

\*what you must show is that all parties intended to engage in a trust

### **Provender v Wood**

#### Issue

-Can Provender bring an action against Wood for a contract that he was not party to?

#### Ratio

-Yes, One whom is the beneficiary of a promise may bring action upon that promise

\*\*Demonstrates early way of english courts about thinking about privity\*\*

### **Tweddle v Atkinson**

#### Issue

-Does the doctrine of privity apply, even though parents stipulated that groom could sue for the promise?

#### Ratio

-Court goes the other way than in Provender v Wood

\*no stranger to the consideration can take advantage of a contract, although made for his benefit

-make the argument that it wouldn't be just to allow a party to sue on a contract (not being a part of it) if they could not be sued under the same contract

\*\*Goes against Provender v Wood, say that there must be direct consideration flowing from plaintiff to defendant if they want to sue\*\*\*

### **Dunlop Pneumatic Tyre Co. Ltd. v Selfridge & Co Ltd**

#### Issue

-Can Dunlop sue Selfridge indirectly through the contract? or does this fall into the doctrine of privity?

#### Ratio

-Judge finds that the contract is not between Dunlop and Selfridge, but Dunlop and Dew, and then Dew and Selfridge

\*says that Selfridge could have gone to Dunlop, but chose not to

-Further says that Dew was not the agent of Dunlop, but was the principle of the opposite side of the contract

\*if they were there agents there would have needed to be another contract stipulating that

-In order to sue then, Dunlop would have to show that significant consideration moved between themselves and Selfridge

\*There was no legal detriment in this case, and therefore there could be no contract

-Therefore court finds that Dunlop did not stipulate in the contract with Dew enough to allow them to sue upon the subsequent sales Dew made

3 principles: 1) Only a person who is party to a contract can sue on it

2) If a person with whom a contract not under seal has been made is to be able to enforce it consideration must have been given by him to the promiser or to some other person at the promisor's request

3) A principal not named in the contract may sue upon it if the promisee really contracted as his agent

\*2/3 are arguably the same thing

\*\*Upholds notion that there must be direct consideration flowing from the plaintiff to the defendant to sue\*\*\*

### **Beswick v Beswick**

#### Issue

-Can Wife sue the nephew for not paying her what she was allotted in the contract as she is a third party to a contract?

#### Ratio

-Judge decides that the wife only has a case in her professional capacity

\*suggests that the remedy for this, nominal damages for breach of contract (40 shillings) would be unjust as it would allow him to acquire the business at a tiny cost

\*thus, says that a remedy of specific performance would be warranted

-Says that had the breach gone the other way, Beswick junior could have gained a mandate for specific performance if Beswick senior had not honoured his bargain

\*\*Allows a 3rd party to collect specific performance on a defaulted contract, but this is only because she is the executor of the estate\*\*

### **Vandepitte v Preferred Accident Insurance Co**

#### Issue

-Was the daughter a party to the contract as covered under the Insurance Act? Was the contract a trust in which she was the beneficiary?

#### Ratio

-First question essentially asserts that the father acted as the daughters agent in signing the insurance contract for her

\*however, this cannot be as she had no intention of this arrangement, policy was entirely arranged by the father and the insurance company, and he alone signed it

-Trust question asks whether the daughter can sue as a beneficiary of a trust?

- \*issue is the intent to constitute the trust must be affirmatively proved, the intention cannot necessarily be inferred from the mere general words of the insurance policy
- \*Court suggests that as there was no intention to create the trust by the father or the insurance company, it cannot be held as this type of legal relationship
- Find that the provision allowing her to drive without being sued was no good as she was not a party to the contract
- This is a ridiculous result, and immediately is overridden by legislation
- \*\*Trusts must be arranged in a situation in which all parties intend upon the trust\*\*

### **New Zealand Shipping Co Ltd v AM Satterthwaite & Co Ltd**

#### Issue

-Whether the Defendants could be protected by the limiting clause even though they were not necessarily party to the contract?

#### Ratio

- Judge suggests that the only way the action could succeed was if the overarching shipping company could be seen as an agent for NZ Shipping Co
- 4 conditions: 1) Contract makes it clear that the 3rd party is intended to be protect by the provisions in it which limit the liability
- 2) Contract makes it clear that the promisee, in addition to contracting for these provisions on his own behalf, is also contracting as agent for the 3rd party that these provisions should apply to the 3rd party
- 3) Promisee has the authority from the 3rd party to do that
- 4) Any difficulties about consideration moving from the 3rd party are overcome
- Judge states that the first 3 conditions are met quite easily
- \*says that by the rules of international shipping, and the contract at hand, the unloader (3rd party) is clearly meant to be covered by the same exceptions as the carrier company (promisee) (clauses 1 +2)
- \*Also, finds that by agreement between the carrier and the unloader, that the carrier was authorized to contract on behalf of the unloader (also it was it's parent company, so this made it even more concrete) (3)
- Question is really whether there was any consideration that would arise between the unloader and the shipping company (manufacturer)
- \*On appeal, the court had said that there was no consideration
- \*However, court finds that while initially the promise was unilateral in nature between the shipper (manufacturer) and the carrier was unilateral, there was the ability for it to be mutual
- Court adopts unilateral contract model in this case
- \*there is an offer put out to all stevedors to unload the drill for the contract price, and whichever stevedore does the work, will be the beneficiary of the contract
- \*offer is relayed through Federal Steam, and the consideration for the offer flows directly to the promisor through the unloading of the ship
- \*\*\*Reveals 4 criteria for finding agency, they are particular\*\*\*
- \*\*\*Shows court is willing to be creative on the consideration requirement (#4)\*\*\*

## **London Drugs Ltd v Kuehne & Nagel International Ltd.**

### Issue

-Did the employees owe a duty of care to the appellant? If yes, Can the respondents obtain the benefit of the limitation of liability clause contained in the contract of storage between their employer and the appellant so as to limit their liability to 40\$?

### Ratio

-SCC finds that the respondents owed a duty of care to the appellants

\*makes them liable for the damages, unless they are limited by the clause saying damages cannot exceed 40\$

-Hinges upon whether the respondents can be considered party's to a contract

-The court says that this is the opportunity to establish a defined precedent for the doctrine of privity in relation to 3rd parties

\*judge suggests that when a liability limiting clause is in a contract, it is perverse for this clause to extend only to the employer and not the employees

-says that it is essential in contract law to extend such a clause to the 3rd party employees

\*further, holding the employees liable, would be in effect, circumnavigating the contractual limitation on liability

-Court then considers in what circumstances should employees be entitled to benefit from limitation liability clauses found in a contract between their employer and the customer?

\*must meet 2 requirements: 1) Limitation of liability clause must either expressly or impliedly extend its benefit to the employees seeking to rely on it

-employers and customers must choose language specifically with the intent of extending liability to workers or not to demonstrate this intention (can be express or implied)

2) Employees seeking the benefit of limited liability must have been acting in the course of their employment and must have been performing the very services provided for in the contract between their employer and the customer when the loss occurred

-Says that this test is almost identical to that laid out in *New Zealand Shipping* agency exception

\*clauses cover all of the *New Zealand* framework

-Court also clarifies that this is a very limited exception to privity, as it only covers contracts that are made, and contain a limited liability clause, and it only works as a shield

-In the case at hand, finds that the respondents were working in their duties to their employer, as well as in the context of the contract between London Drugs and their employer

-In terms of the contract issue, the contract did not specify that the limited liability was to apply solely to the employer, and that the respondents were implied to be included in the limited liability clause, as the term warehouseman is unspecific, and the appellants knew that the employees would be primarily responsible for the moving of the property

-Thus, finds the respondents liability limited to 40\$

## **Edgeworth Construction Ltd v N.D. Lea & Associated Ltd**

### Issue

-Did the contract between the contractor and the province negate the duty of care between the contractor and the engineers?

### Ratio

- Defence works this way: \*Province got engineers to do survey and draw plans so that potential builders could cost out road and bid on it
- \*Thus, the Province should be the one to take the heat for negligent representation, as they are the party that Edgeworth contracted with to build the road
- Issue is whether a liability limiting clause in the contract that negates the liability of the Minister in the case that the plans are incorrect extends to the engineers (a la *London Drugs*)
- Bev says no because the engineers were not powerless to protect themselves (could have bought insurance, put a clause on the designs, etc.) and the contract clearly intends for the liability exception only apply to the Minister
- \*\*\*Suggests that *London Drugs* extensions will not be applied in cases which the defendants were not helpless to protect themselves\*\*\*

### **Fraser River Pile & Dredge Ltd. v Can-Drive Services Ltd.**

#### Issue

-Is Can-Drive, as a third-party beneficiary under the insurance policy pursuant to the waiver of subrogation clause, entitled to rely on the clause to defend against the insurer's surrogated action on the basis of the principled exception to the privity of contract doctrine established in *London Drugs*?

#### Ratio

- Test: 1) Did the parties to the contract intend to extend the benefit in question to the third party seeking to rely on the contractual provision?
  - 2) Are the activities performed by the third party seeking to rely on the contractual provision the very activities contemplated as coming within the scope of the contract in general, or the provisions in particular, as determined by reference to the intentions of the parties?
- 1) Says the contract explicitly stated that it was meant to apply to those chartering the barge (Can-Drive), and there is nothing in the contract suggesting that the contractual right can only be exercised by Fraser for Can-Drive
- 2) Contract contemplated those chartering the barge, which is what Can-Drive was doing, and therefore the contractual exemption should be applied
- Iacobucci then discusses policy reasons in favour of upholding the exemption
- \*Says that the ruling in *Vandepitte* was unreasonable and out of touch with commercial reality
- \*creating a relaxation of the privity rule in cases where it is contractually proposed that a 3rd party should benefit from the contract is not going to damage contract law
- Suggests that this should not be a complete dissolution of privity, but a limited exception in cases in which a 3rd party is attempting to defend itself against liability through enforcing a contract it is not party to but contemplates it
- \*No sword shield distinction mentioned, which is important for an exam potentially\*\*
- Can work both ways, could argue that this means Iacobucci's principled approach would apply to any case in which there was intention to apply contract to a third party

