# Contracts – Fall 2015 – MacDougall- Jenny Musyj

# Who Can Enforce the Promise?

## Privity

* Who can enforce the contract and against whom can it be enforced?
* If you are not the offeror or the offeree – you are not privy to the contract

### Horizontal Privity

* Where A enters into a K with B for something that also benefits C, but C cannot bring an action against B for not performing the obligation. A can enforce it but can only be remedied for damages that A suffered, not those of C: ***Tweedle v Atkinson* Parties not privy to K cannot derive benefit from it (sue) nor are they subject to its obligations**

### Vertical Privity

* A has a K with B who has a contract with C. C is not privy to the K between A and B and vice versa: ***Dunlop Tyer v Selfridge***
  + Chain of contracts (ex: buyers and sellers), can only sue the person above and below you
  + You cannot sue a 3rd party to K for breach unless other party to K was acting as agent for 3rd party

### Circumventing Privity

* If it’s possible to get specific performance, then it could be used to benefit the third party who is not privy to the K, however, specific performance must be obtained by a party to the K, and not by the third party: ***Beswick v Beswick***
* **Agency:**
  + A enters into a K with B for the purpose of benefitting C, where A is acting as C’s agent, and therefore the K is actually between B and C
  + A COULD be entering into 2 contracts with B (1 for A and 1 for C, ex: group travel)
  + It MUST be shown that the K benefits the third party, ideally without benefitting the agent directly
  + There can be no agency relationship without consideration from the other party: ***Dunlop Tyer v Selfridge***
  + Courts are reluctant to find A as an agent for C when A and C have conflicting interests: ***Dunlop Tyer v Selfridge***
* **Exceptions to Privity:**
  + Where two parties enter into a K that has a defence intended to benefit a third party, the third party is entitled to benefit from the defence, even if they are not privy to the K, but only as a defence, not as a cause of action!: ***London Drugs v Kuehne &Nagel*** (employment Ks ONLY)
  + Eliminates the constraint of employment Ks: ***Fraser River v Can-Dive Services -* Crystallization of rights of 3rd party to K, but not other parties to K**

# Intention to Create Legal Relations

* Courts will not enforce promises or recognize them as Ks where there is no intention to create legal relations
* In social, family and domestic situation where there is no mention of intentions to create legal relations, the courts will assume there is none: ***Balfour v Balfour***
  + Courts have since relaxed how strict this rule is in a family context
  + Lord Denning says " there domestic arrangements are ordinarily not intended to create legal relations; it is altogether different when the parties are not living in amity but are separate --> they can be presumed to have intended to create legal relations"
* ***M v A***: court ruled no intention to create legal relations because it was made within a romantic relationship
* Courts have a strong presumption in business situations that there is an intention to create legal relations, unless it is explicitly stated to the contrary by the parties involved: ***Rose and Frank v JR Crompton Bros***
  + Assume that there were intentions in order to protect both parties, especially the consumer
  + Policy issue if courts decided there were no intention to create legal relations in business scenarios if it was not explicitly stated

# Offer

* Offer sets the terms of the K
* Courts can help formulate a K
* Terms can be implied on reasonableness and necessity

### Express vs Implied terms

* Ks may come about from actions instead of negotiation which can make it hard to analyze offer and acceptance

### Was there an offer?

* **Factors to distinguish an offer from an invitation to treat:**
  + Are the terms of the K complete? Can the K be formed by just saying yes? If there is still uncertainty and missing details, it might not be an offer.
    - Are the details of the eventual K clear or can they be worked out from the communication that has been made?
  + Would treating communication of an offer lead to an absurdity? (ex: creating multiple Ks when multiple Ks is clearly not wanted: ***Carlill v Carbolic Smoke Ball Co***)
  + If a statement can be interpreted as an offer by a reasonable person, then it is an offer: ***Carlill v Carbolic Smoke Ball Co***
  + Intention, illustrated through total context (language, conduct) is the primary factor in determining whether there was an offer or if it was an invitation to treat ***Canadian Dyers Association Ltd v Burton***
    - Look to intention of parties, language between parties, history between parties and conduct after the fact (did the parties act as if there was a contract?)

### Who Makes the Offer?

* Only the offeree can accept the offer, usually the offeror sets the terms of the contract
* Although both parties might be involved in negotiations, legally the offer comes from one of the parties (offeror/offeree): ***Pharmaceutical Society v Boots Cash Chemist*** 
  + Retail Scenario: display of price and placement of goods on shelves is an invitation to treat, customer makes the offer to the cashier at the checkout, which the cashier then accepts: ***Pharmaceutical Society v Boots Cash Chemist***

## Communication of Offer

A valid offer requires 2 things:

1. **Communication:** an offer is not legally effective until it is communicated to the offeree
2. **Knowledge:** an offeree cannot accept an offer unless they have knowledge of the offer

* **Motivation for acceptance is irrelevant**, as long as there was communication of the offer by the offeror, and knowledge of the offer by the offeree: ***Williams v Carwardine*** (not valid authority though as this statement came from the lawyer and not the judge)
* Motivation is irrelevant BUT the offeree can’t accept the offer without intention and to have intention, you need to have knowledge.
  + Ignorance of the offer = lack of knowledge = lack of intention: ***R v Clarke***
  + ***Clarke*** relies on ***Williams*** which doesn’t give valid authority for the statement

# Termination of Offer

## Revocation

* Offer can be terminated by offerer (revoke), offeree (rejection), or a lapse of time
  + Implicit reasonable time frame or offer can be made in such a way that is self-expiring
  + Must communicate revocation (must reach offeree to be effective – postal acceptance rule doesn’t apply), any time before acceptance (will not create a breach, even if it is early revocation): ***Bryne v Vantienhoven***
    - A person who has accepted an offer and not known to him to have been revoked, shall be in a position to safely act upon the footing that the offer + acceptance constitute a K binding on both parties
  + Offeror doesn’t have to provide formal notice of revocation of offer, it may be sufficient enough for the offeree to gain knowledge of offer being revoked (ex: through an action; through a third party): ***Dickinson v Dodds***
* Can you revoke an offer, if the offer itself says it can’t be revoked until a certain time?
  + Yes because there is no contract until the offer has been acceptance, so if no acceptance, the offeror isn’t bound by his promise to keep the promise open: ***Dickinson v Dodds***
  + BUT to prevent early revocation, create an **option contract** – with consideration or else Courts are reluctant to accept these
* Mass offer to a large group/public can be revoked as long as same method of communication for the offer was used: ***Dickinson v Dodds***
* Death revokes the offer: ***Dickinson v Dodds***

## Revocation for Unilateral Contracts

* Unilateral contract: if only one party has any obligations under the contract
  + For the other party to accept the offer, they must have already done something because consideration has to be given at the time of acceptance
  + Acceptance is usually in the form of actions
* If early revocation causes hardship to the offeree (ex: offeree has partially performed preconditions), no early revocation can be allowed
* If the offeror knows that the offeree has begun to do what is necessary to accept the offer, the offeror cannot terminate the offer: ***Errington v Errington*** (equitable doctrine, not part of contract law)
* If ***Carlill*** was a unilateral contract, then the smoke ball company would have been able to terminate its offer while Carlill was doing the actions necessary to accept because they had no knowledge that she had begun to do what was necessary

## Rejection and Counter Offer

* Rejection by the offeree through a counteroffer: rejection vs request for clarification
* Some offers need acceptance to make precise what is imprecise in the offer (ex: I’ll give you up to 1000 X at $y and the acceptance is “I’ll take 400”)
* Three ways of rejection other than outright: inaction, silence, implicit rejection
* ***Livingstone v Evans***
  + The offeree must accept the terms of the offer; proposing any changes is a counteroffer and therefore a rejection
  + A counteroffer will not be a rejection if the counteroffer includes an intention to keep the original offer on hold
  + Once the offer is rejected, only the offeror can revive the original offer by re-offering it
  + An offer can be renewed through ambiguous language (ex: “cannot reduce price” therefore, implying that I am re-offering the original price)

## Termination of Offer through Lapse of Time

* No offer is open for an eternity

***Barrick v Clark***

* If no time is specified in the offer, then the offer lapses after a **reasonable time**
  + Reasonable time: nature and character of negotiations, normal/usual course of business, and circumstances of the offer (including conduct of the parties)
* If no lapse of time state or implied in the offer, look through the perspective of the offeree
* If lapse of time stated or implied, look at time through perspective of the offeror

# Acceptance

* The acceptance must come from the offeree or someone on behalf of the offeree
* An acceptance needs to be an unqualified yes, anything else will terminate the original offer, BUT if the original offer is revived after a counteroffer, it can be accepted: ***Livingstone v Evans***
* All the terms must come from one side (offer) (Denning’s statement of terms being able to come from both sides has been seen as bad law): ***Butler Machine Tool Co v Ex-Cell-O Corp***

## Communication of Acceptance

* Acceptance must be **communicated** in order to be valid
* EXCEPTIONS:
  + Postal Acceptance Rule – post office acts as agent: ***Household Fire***
  + Explicit waiver of communication – offeree still needs to accept through actions: ***Carlill v Carbolic Smokeball Co***
* Cannot state in contract that silence can be viewed as acceptance: ***Felthouse v Bindley***
  + No way to prove offeree accepted and it places the burden on them to get out of the contract (can’t do this!)

### Waiver of Communication

* Communication is for the benefit of the offeror, so offeror can waive need for communication of acceptance – performance of the condition in offer is sufficient (but can’t be silence): ***Carlill v Carbolic Smokeball Co***
* If offer makes clear that specific actions need to be done to accept, then acceptance doesn’t need to be communicated: ***Carlill v Carbolic Smokeball Co*** (didn’t tell them she bought the ball)

### Postal Acceptance Rule

* Communication/acceptance occurs the moment the acceptance is given to the post office: ***Household Fire***
* If offer is sent through mail, and return address is put as place to send acceptance, then it shows that offeror is content to use the mail and accepts the postal acceptance rule: ***Household Fire***
* DOES NOT APPLY IF:
  + Offer explicitly states that it doesn’t exist: ***Holwell Securities***
  + Applying the rule would lead to an absurdity (look at context, ex: marriage, personal service contracts, etc): ***Holwell Securities***

### Where does Acceptance Occur?

* Acceptance occurs where and when it is **communicated** 
  + Applies to instantaneous communication (fax, email, telephone): ***Brinkibon v Stahag Stahl***
* Contract comes into existence WHERE acceptance is communicated
  + Important to determine what jurisdiction’s rules apply and where an action occur
* With answering machines OR emails OR fax machine as long as the message of acceptance reaches the machinery or other facilities in the offeror’s control, it will be said to have been communicated, even if the offeror has not actually read the message. It would cause undue hardship to the offeree otherwise.

## Acceptance of a Unilateral Contract

* Potential problem: offeror revokes offer while offeree is in the process of performing necessary actions to accept
* ***Carlill v Carbolic Smokeball Co:*** if it was a unilateral, no reason why Carbolic couldn’t revoke offer while Carlill was performing actions 🡪 if it had been interpreted as bilateral, then the company couldn’t just revoke the offer K would’ve been created when Carlill bought the smokeball
* Courts should interpret contractual situations as being bilateral rather than unilateral whenever possible: both parties are protected from time before performance begins on either side

# Certainty of Terms

* For K to legally exist, must be certainty of terms – otherwise, K hasn’t come into existence even if both parties want a K
* General principle that Ks will be saved whenever possible: ***Hillas v Arcos***

K **must** contain at least essential/material terms (if missing, K will be invalid: ***May & Butcher v R***) and will depend on the type of K

* + - An agreement to set a critical term later is not valid: ***May & Butcher v R***
    - Possible for the essential term to be implied by statute (ex: *Sale of Goods Act*)
  + With all issues of certainty (missing, ambiguous, contradictory) courts will look to the rest of the K and the context to try to resolve the issue (interpret broadly), so long as it is clear that the parties intended to enter into the K: ***Hillas v Arcos***
    - Interpret the K and imply what the parties are wanting – look at the intentions of the parties when the K was created: ***Foley v Classique Coaches Ltd*** – affirmed ***Hillas***
    - If there are differences between the parties, the court can imply what is reasonable – **what can be made certain IS certain**
    - Even if material terms are missing, a court may find, through context, that these have been implicitly addressed

## Promises to Negotiate in Good Faith

* Unclear because who knows where they lead to?
* Can be an implied duty to negotiate in good faith where there is a clear, but still ambiguous reference/measuring stick (market value, rent): ***Empress Towers Ltd v Bank of Nova Scotia***
* Courts will try to give meaning to an ambiguous clause for future agreement where there is an ascertainable meaning that is unclear: ***Empress Towers Ltd v Bank of Nova Scotia***
* Courts can NOT find a new K, BUT can enforce obligation to negotiate in good faith: ***Empress Towers Ltd v Bank of Nova Scotia***
* Where there is no benchmark, promise to negotiate in good faith can’t be binding: ***Manpar Enterprises v Canada***
* Can’t get anything positive by arguing breach of promise to negotiate in good faith, but can use it to prevent the other party from getting what they want: ***Manpar Enterprises v Canada***
  + Court won’t give other party what they want if they haven’t attempted to fulfill obligation to negotiate in good faith
* Possible to use as a defence: ***Empress Towers Ltd v Bank of Nova Scotia***. Can’t use this as a claim, only as a defence: ***Manpar Enterprises v Canada***

# Enforceability Issues

* There are primary rights/obligations (XYZ) as well as secondary rights/obligations (xyz) that are the damages that arise if the primary obligations are breached
  + When obligations are enforceable the secondary obligations will back up the primary obligations
  + If obligations are unenforceable there is no remedy available for a breach of obligations
* **3 ways to make a contract enforceable:**
  + **Seal**
  + **Consideration**
  + **Estoppel** – equitable remedy available when there is no seal or consideration

## Promise Under Seal

* **Promisor** must be the one to seal the contract
  + To be valid under seal, promisor must affix the seal to the K making the promise AND be aware of the significance of attaching a seal
* The seal changes it from a gift (gratuitous promise) into a valid contract
* Any representation of a seal is sufficient (gum wafer, written) IF the seal is created by the promisor AND the promisor is aware of the significance of the seal: ***Royal Bank v Kiska***
  + Writing the words “seal” does not qualify as a valid seal if not created by the promisor

## Consideration for the Promise

* Price of the promise – what is given by the promisee in exchange for the promise of the promisor.
  + This makes it not gratuitous and something legally enforceable
* Rules of Consideration:
  + Consideration must be given by the **promisee**
  + Consideration must be given at the time of acceptance
  + Has to be “fresh” (usually) – must be something that makes the promise NOT a gift, something that would NOT happen in any event if a gift was given: ***Thomas v Thomas***
  + Consideration is given to the promisor or third party
  + Consideration must have some value in the eye of the law, moving from the promisee: ***Thomas v Thomas*** (motive isn’t consideration)
  + Consideration must be a **benefit** to the promisor OR a **detriment** to the promisee OR both
  + Consideration can be expressly agreed b/w the parties, or it can be implied
  + Consideration where anything that is to be given depends on the whim of the promisee (“if I feel like it” or “if I think circumstances are appropriate”) is valueless consideration
* If there is no seal AND no consideration, then the promise IS NOT enforceable, but there is a valid contract in existence

## Distinguishing Consideration

* **Failure of consideration:** DOESN’T mean there is no consideration and therefore, isn’t enforceable, it has to do with a breach of contract
* **Adequacy:** law DOESN’T assess quality of consideration, all that matters is that there is SOMETHING – you can give a peppercorn for a Rolls Royce if you want and it will make the contract enforceable, can be anything of physical value no matter how nominal: ***Thomas v Thomas***
* **Motive:** not consideration, consideration is the benefit/burden that is expected from the contract

## Forbearance

* Generally unproblematic as it’s usually to the detriment of the promisee
  + A promise not to do something (likely not to sue) can be equally as valuable as promising to do or give something
* If the promisee offers by way of consideration a promise not to do something, where the promisee has no business doing what s/he promised not to do in the first place 🡪 **valueless consideration**
* A promise not to bring about a lawsuit where the promisee **knows** that such a promise is worthless becacuse the lawsuit or legal claim is groundless CANNOT count as valid consideration because the promise is worthless and of no value (no benefit and no detriment)
  + there is no valuable consideration where the forbearance to bring an action, claimed as consideration, is in a context where the promisor knows the claim to be invalid or does not seriously intend to pursue it: ***B (D.C.) v Arkin***
    - Onus on the promisee to show that the belief was reasonable – ignorance of the law is not a defence

# Problematic Consideration

## Past Consideration

* Past consideration not valid because consideration must be given at time of promise AND must be “fresh”/new: ***Eastwood v Kenyon***
* HOWEVER, if past act done at promisor’s request and later promised to compensate, courts will overlook past consideration and make it a binding promise: ***Lampleigh v Braithwait***
  + Affirmed by ***Pao On v Lau Yiu Long*** 
    - “An act done before the giving of a promise to make a payment or to confer some other benefit can *sometimes* be consideration for the promise. The act must (1) have been done at the promisors request, (2) the parties must have understood that the act was to be remunerated either by payment or the conferment of some other benefit, (3) payment, or the conferment of a benefit, must have been legally enforceable had it been promised in advance.”

### Exceptions to Past Consideration

1. X does a favor for Y in exchange for a promise by Y to pay X $10, but Y **does not have the capacity** to pay while making this promise. Y’s promise would be currently unenforceable, but once Y **gains capacity** and he confirms his promise to X, then this is an enforceable promise. While X has done the act already, making it past consideration, the courts will excuse this and make it enforceable: ***Eastwood v Kenyon***
2. **During an emergency**, X does/gives something to Y at Y’s request without giving Y any consideration in return, BUT it is reasonable for X to assume that there might be compensation for what he does/gives. After the emergency, Y makes a promise to compensate X after the act is complete. The court will excuse past consideration and make this valid: ***Lampleigh v Braithwait***
3. X is doing or giving something to Y out of **necessity**. If Y makes a promise after X already did the act, then this too would be an exception to past consideration.

## Pre-Existing Legal Duty Owed to the Public

* Not valid consideration UNLESS something new is added beyond bare public duty, such as promise to perform the public duty in a certain way
  + Creates something new since a new person can enforce the duty/promise

## Pre-Existing Legal Duty Owed to a Third Party

* This type of consideration is now **acceptable**
* Creates something legally new and valuable because the promisor can also enforce the duty. Promisee gets a detriment as they have another party to be accountable to: ***Pao On v Lau Yiu Long-*** A promise to perform, or the performance of a pre-existing contractual obligation to a third party can be valid consideration.

## Pre-Existing Legal Duty Owed to the Promisor – PROBLEMATIC

### Promise to Do More

* Five ways to enforce a promise to do more in an existing contract:
  + Agree that the existing contract is being scrapped/rescinded and then enter into a new contract where an obligation may be enhance (needs to be VERY clear that old contract is scrapped)
  + Use a seal
  + Create new consideration
  + Argue that you don’t need consideration: ***Greater Fredricton***, but is this really good law?
  + If none of these work, use promissory estoppel: ***Greater Fredricton*** and ***Gilbert Steel*** say you CAN’T use this, BUT ***Walton Stores*** says you can (Australian though)
* A promise to pay more is not enforceable because there is no new consideration given in return and consideration given for a promise to pay more must be certain: ***Gilbert Steel -*** If someone is paying nothing new and relying on what they already paid relying on the obligations in the past, they CANNOT do this
* **BUT**, perhaps a promise to do more can be enforceable if conditions are met: ***Greater Fredricton***
  + If the promise to pay more is a variation of the existing contract
  + If there is no economic duress
    - Consideration may not matter if both parties agree to enhance/change an existing obligation – can rely on consideration from original K if just modifying

### Promise to Accept Less

* Four ways to enforce a promise to accept less:
  + Put promise under seal
  + S43 of *Law and Equity Act*: **Actual** part performance, not just promise of part performance, expressly accepted in satisfaction of the greater obligation will be enforced as a promise to accept less (cannot use for something that is relied on in the future) – would overrule ***Foakes v Beer***
    - Person promising to accept less can actually revoke that promise but the action of accepting less will extinguish the full obligation
    - **USE THIS BEFORE ACCORD AND SATISFACTION**
  + Consideration (accord and satisfaction): ***Foot v Rawlings***
    - Courts will be generous in finding consideration
    - A new method of payment (ex: new place, new instrument of payment) will count as new consideration
    - Post-dated cheques is enough detriment to the promisee to count as good consideration for a promise to accept less
  + Promissory estoppel (narrow doctrine: ***High Trees***)
* Promise to accept less is not enforceable if promisee is not giving any new consideration – payment of a lesser sum than what is owed is NOT consideration for a promise to accept less: ***Foakes v Beer***
  + A change of payment dates isn’t enough consideration

# Making Promises Bind Through Equity

## Estoppel

### Promissory Estoppel

* A promise or assurance made to someone who relies on it (behaves as if it was intended to be binding) and would suffer a detriment if the promise was not binding, then the promise may be binding (equity would consider it). Lots of constraints on how equity would make it binding:
  + Equity will make it binding as a defence to a claim: ***Combe v Combe***, but ***Walton Stores*** has tried to change that view
  + Could be time/situation limited in that the person making the promise could end its effect by giving notice: ***High Trees*** (sometimes not possible and a one-time payment is unlikely to do this)
    - Promissory estoppel is not permanent and can be terminated
  + Because it is equity, the court will look at all surrounding circumstances, and if it doesn’t think it’s fair to hold somebody to the promise, then they won’t (ex: clean hands): ***D&C Builders v Rees***

### Promissory Estoppel to Enforce a Promise to Accept Less (Shield)

* Promisor must intend for the promise to be binding AND the promisee must rely on that promise
* **BIG DOCTRINE:** where a person makes a promise intending it to be relied upon and the promisee relies on it, the promise is binding: ***High Trees***
  + Revived by: ***Walton Stores***
* **SMALL DOCTRINE:** a promise to accept a smaller sum in exchange of a larger sum, that was intended to be binding, if acted/relied upon, is binding regardless of no consideration: ***High Trees***
* A person is held to a promise through estoppel as long as the promise is fair: ***High Trees***

### Restrictions on the (Big) Estoppel Doctrine from High Trees

1. Need to have an **explicit** promise or statement for promissory estoppel to apply: ***John Burrows v Subsurface Surveys***
   * “indulgences in the past do not mean that indulgences will occur in the future” (not using the acceleration clause in the past doesn’t estop party from using it in the future)
   * If a party ***waives*** their right to do something, then they are estopped from going back on it (unless expressly reserved right to change their mind)
2. Promissory estoppel is unavailable where inequitable (duress, undue pressure, deceit, something unconscionable): ***D&C Builders v Rees***
3. **BIG CONSTRAINT**: Promissory estoppel can be used as a *shield* and not a *sword*: ***Coombe v Coombe***
   * Estoppel can be used to reduce a current obligation, but not increase
   * Can't go to court and say you want something from the other party through estoppel

### Promissory Estoppel to Enforce a Promise to Pay More (Sword)

**What is needed:**

1. Promisor makes promise with expectation that it will induce action or forbearance on promisee
2. It DOES induce action or forbearance on the promisee (reliance)
3. Would be **unconscionable** to the promisee if promise is revoked (extreme detriment required)

* Even if parties don’t have a contract, a promise that one party made can still be made enforceable – promissory estoppel can be a cause of action: ***Walton Stores***
  + If the promisor makes a promise with the reasonable expectation that it will induce action or forbearance and does in fact do so, and will cause a detriment on the promisee if that promise is not kept, then the promisor is held to that promise 🡪 cause of action – **only** possible where necessary to avoid unconscionability
  + Authority in Canada: no court has accepted or rejected it
    - *Greater Fredriction* seemed to reject it, but *M v A* spoke warmly of *Walton Stores*, but didn’t apply it
* Does NOT reject that if there has been intentions to create legal relations, then you could use ***Walton Stores*** and say estoppel can be a cause of action: ***M (N) v A (AT)***

### Test for Promissory Estoppel as a Sword

* Is there a promise?
* Was it relied on to P’s detriment?
* Was it revoked? If so, was it unconscionable?
* The promise can be a reduction, enhancement, or creation of existing obligation
* Expectation of legal agreement – intention to create legal relations: ***M (N) v A (AT)***