TABLE OF CONTENTS

B. WAIVER & PROMISSORY ESTOPPEL

C. PRIVITY

1. Third-Party Beneficiaries

2. Circumventing Privity

a) Specific Performance

b) Trust

c) Agency (see Dunlop above)

d) Assignment Contract

e) Employment

I. INTRODUCTION TO CONTRACTS

The law begins when people interact with each other (even 2 people)

3 Systems of Law operating at the same time:

the common law	equity	statutory/constitutional
inherited from the royal courts (King Henry 10th c)	inherited from chancellor of the king's court (cleric)	Parliament
black and white, concrete, efficient	equitable, fairness, discretionary	rules written down in statutory laws
role of law and judges = referee	set up different courts to resolve issues	
people work things out themselves or need referee (the courts)	you have rights when you are given them, contingent (keeper of the king's conscience)	

Hierarchy of Systems: statute prevails! (trumps everything)
(however, statutory provisions have been narrowed meaning that in many cases where you think a statute should apply, the courts have said that it doesn't)
LOOK AT COMMON LAW NEXT
EQUITY FOLLOWS THE LAW, however if these are different, then EQUITY TRUMPS COMMON LAW (this rarely happens, the court must be persuaded by the breacher)

With regard to contracts,
1. First ask IS THERE A CONTRACT? - timing issues, etc., go to common law
2. Determine if something has occurred to make the contract go away - equity
3. What is IN the contract? What's the problem? need to add - statute

Remedy or Relief for breach of contract:
common law response = damages in form of $ (substitute)
equity response = specific performance, if common law remedy is not adequate

discussions -------- contract ---------- complaint
- equity looks at what happened during the discussions in order to potentially rescind contract - common law looks at what happened after the contract only

Transfer of ownership is facilitated by contract law (aspect of property law)
- historically only actual transfer of physical property recognized, needed way to address promises

Solutions
1. Mercantile Law - promise in written form = property itself (instrument) (late 18th C.) - transfer thru negotiation
2. Common Law (16th C.) - area of tort called trespass, a promise is an intangible property - TRESPASS ON THE CASE - direct ancestor of contract law

a. had to show one person took on an obligation [assumpsit]
b. could only enforce promise where there was a reason - what exchanged?
Must give consideration in exchange for a promise [assumpsit in consideratione]
c. too many so would only deal with promises in written form (Statute of Frauds)

Contract Law: Issues to Consider **(bold in December exam)**
Is there a contract? **Formation [Part II]**
How to enforce the promises in the contract? **Enforcing Promises [Part III]**
***Who* can enforce the promises? Privity [Ch 6]**
***What* needs to be shown to enforce promises? Consideration, Seal, Estoppel [Ch 7, 8]**
How are the terms in the contract significant? Terms [Part IV]
Classifying terms for specific purposes - Categorising Terms [Ch 9]
Special treatment for exclusion and limitation clauses - [Ch 10]
How can a party contest the contract? Contesting the Contract [Part V]
On what bases? Capacity [Ch11], Misrepresentation [Ch12], Mistake [Ch13], Duress [Ch 14], Undue Influence [Ch14], Unconscionability [Ch14], Illegality [Ch15], Frustration [Ch16], Limitation of Actions [Ch17]
What will happen if the contestation is successful? Eliminating or Altering the Contract [Ch18]
What remedies are there for the other party's breach of contract? Remedies [Part VI]

II. FORMATION OF THE CONTRACT

To have a contract, you need the following ingredients:

Ingredient	Importance	Issues to Consider
Offer	-indicates readiness to enter contract, if other agrees -sets the terms of the contract	-complete enough to form offer? -indicates readiness to be bound? -to whom is offer made? - has offer been terminated?
Acceptance	-agreement to offer -timing important: creates contract, time for consideration, damages, mistake, etc.	-is it unqualified "yes"? -has it been communicated?
Consensus ad Idem	-both parties agree at the same time to the particular contract	-is such simultaneous, subjective agreement even needed at c.l.?
Intention to Create Legal Relations	-shows intention of parties to have a legally-binding agreement	-is there a public policy reason for allowing or not allowing no i.c.l.r. in given context?
Certainty of Terms	-identifies clearly what was agreed	-can terms be implied to help clarify? -can principles of interp. or rest of contract help? -can some "terms" be jettisoned as irrelevant?
Written Record	-sometimes required by statute - useful for evidentiary purposes	-is the written record complete?

A. OFFER

Def'n: an indication, by words or conduct, of a willingness to enter into a legally binding contract, which implicitly or explicitly states that it is to become binding on the offeror as soon as it is accepted by an act, forbearance, or return promise by the acceptor.
Not **Puffery**: Claims no reasonable person would believe or expect to hold another to.

1. Offer and Invitation to Treat

In order for a contract to exist there must be acceptance of an offer which sets the terms of K.
In BILATERAL K, the offer determines obligations of both parties, although offer made by 1 party
In UNILATERAL K, offer is made by the person who will have the obligations

Invitation to Treat - some formalized ("bring me an offer", then tender bid = offer)
-does not lead to acceptance, need an offer - sometimes something can be both i.t.t. and offer
-intention can be determine by words or more easily through actions

CANADIAN DYERS ASSOCIATION LTD. v. BURTON (1920), 47 OLR 259 (HC) (p18)
Facts: P offers to sell house – D asks for lower price – P says offer "was lowest prepared to accept, would ask more from any other party" – D accepts; sends a cheques – P keeps cheque; sends draft of closure; later returns cheque and denies K
Quotation of price alone does not constitute an offer, however, the quote specific to D and P's later actions imply he understood that a K had been formed, & thus a contract. D wins.
What is the legal principle in this case that helps us deal with situations in the future?
Ratio: question of intention from the perspective of the "reasonable person" situated in this context - figure out through language, circumstances of the case and the conduct the parties engage in -obj-subj standard = a reasonable person in these specific circumstances]

Negotiations		Contract	
"mere puff" which has no legal meaning	representations	terms = parts of the offer brought into the contract (obligations)	
statements (i.e. quotation of price, colour, ate, exp.)	motivations for entering contract but not necessarily terms	only some of the statements of fact convert into term - if it becomes a promise guaranteed	statement of fact becomes statement of intent

PHARMACEUTICAL SOCIETY OF GREAT BRITAIN v. BOOTS CASH CHEMISTS (SOUTHERN) LTD. [1953] 1 All ER 482 (CA) (p.20)
Facts: pharmacists being governed, new self-service set up (to serve more people), the Society doesn't like this new system (complaint by competitor?) because it does not appears to have the pharmacist supervising the sale of pharmaceutical goods, P argues that K is formed when customer takes product off shelf.
Issue: When does acceptance occur? Therefore, was there an offer?

Conclusion: ***Invitation to treat and offer are distinguished (although something can be both)*** Display of price and goods is an invitation to treat. Offer is the customer taking the item off the shelf and bringing it to register where the store accepts. D wins.

Offer	Offerer	Acceptance	
price listed on shelf	store	picking up item or paying for it	customer
when price scanned	store	pay money	customer
advertisement	store	choosing item	customer
taking items up to the cash register and offering $	customer	accepting money	store, under the supervision of pharmacist

CARLILL v. CARBOLIC SMOKE BALL CO. [1893] Q.B. 256 (C.A.) (p.25)

page 25	CARLILL v. CARBOLIC SMOKE BALL CO. [1893] Q.B. 256 (C.A.)
Cause of A	breach of contract
Procedural H	Hawkins J. held P was entitled to recover 100 pounds, appeal
Facts	Ds put ad in newspapers offering award & put 1000 pounds in bank to prove seriousness, P bought one of the smoke balls on the faith of the ad, used it 3 times a day for 2 months and caught influenza, she asked for the money award, D denies existence of K
Issues	*Does a unilateral offer (involving action by offeror) require communication of acceptance in order to form a binding contract?* *Can an offer made to all the world form a contract?*
Legal Principles	-communication of acceptance is required -a party is always capable of waiving the condition of receiving notice of acceptance - in condition in your favour -definition of consideration
Ratio/holding	***An offer made to all the world that is sufficiently certain in its terms, is good, and capable of resulting in a binding contract with any party who so ever meets the terms of said offer. Where it is possible for a potential offeree to perform such a contract unilaterally, performance of the contract can constitute acceptance of said offer, the offeror being presumed to have waived the right to communication of acceptance, qualification of such in the terms of the offer withstanding***

page 25	CARLILL v. CARBOLIC SMOKE BALL CO. [1893] Q.B. 256 (C.A.)
Reasoning	Arguments: 1) too vague - construction, 2) too many offerees - not unless limitations expressed, 3) she is simply too late 4) no notification of acceptance 5) no consideration, 6) she bought from store but claiming contract with Company - how can you have 2 contracts related to the same thing? overlapping liability Could revoke offer until acceptance occurred...when did acceptance happen? buying smokeball, starts using, completed use, illness, request for money...doesn't matter in this case, all have occurred
Comments	appeal dismissed, P to keep 100 pounds

2. Communication of Offer: Communication, Knowledge and Motive

Questions:

1) Does the offer have to be communicated in order to accept it? (communication)
2) Does the person have to actually know about the offer (knowledge)
3) Does their motive have to be to accept the offer?

Offers must be communicated to the acceptor. One cannot accept an offer in ignorance. Intention to accept an offer is required, but the motive for doing so is considered irrelevant.

WILLIAMS v. CARWARDINE (1833) 110 ER 590 (KB) (p.50)

Facts: D offers a reward for information leading to the arrest of a murderer – P provides information but out of guilt, although she did know of the offer – D tries to deny P reward.
Ratio: Motive is irrelevant; only knowledge of the offer and some intent to accept it are necessary. P clearly had both of those. P wins.

R v CLARKE (1927) 40 CLR 227 (Australian HC) (p.51)

Facts: D offers evidence in a murder trial when is one of the suspects (later cleared) – Later tries to claim reward for his actions – Says at trial he didn't act because of advertisement.
Ratio: Knowledge and intent are required, no contract, P wins

3. Timing within a Contract

Acceptance converts offer into a contract at that moment, representations cease to be relevant

doctrines BEFORE acceptance	doctrines AFTER acceptance
misrepresentation	breach of contract
mistake	frustration
duress	unfairness (?)
undo influence	
unconscionability	illegality straddles both

B. ACCEPTANCE

Def'n: Words or conduct that explicitly indicate absolute acceptance of all the terms in an offer. If any of the terms are different or qualified then there is a counter-offer, which voids the original offer, but no acceptance. Offer comes entirely from 1 party; acceptance comes entirely from other.

1. Acceptance vs. Counteroffers

LIVINGSTONE v. EVANS [1925] 2 W.W.R. 453, [1925] 4 D.L.R. 769 (Alta. S.C.) (p.54)
Facts: D offers to sell land for $1,800 – P asks for $1,600 – D says "cannot reduce price" – P accepts $1,800 – D denies contract
Ratio: Counter-offer kills the offer, but D opened it again with "cannot reduce price" so K is valid. Note that an inquiry about an offer does not kill it. P wins.

BUTLER MACHINE TOOL CO. v. EX-CELL-O CORP. [1979] 1 W.L.R. 401, [1979] 1 All E.R. 965 (C.A.) (p.56) - **later considered BAD LAW, even though case not overturned!**
Facts: P offers to sell machinery with the term that price could fluctuate before delivery – D accepted by mail with different terms – P accepts, delivers, wants higher price.
Lord Denning uses his novel device in obiter about **battle of the forms** in later case -overturned
"There are yet other cases where the battle depends on the shots fired on both sides. There is a concluded contract but the forms vary. The terms and conditions of both parties are to be construed together...if differences are irreconcilable...then the conflicting terms may have to be scrapped and replaced by a reasonable implication."
Denning tried to introduce new logic that all the offers taken together could form offer and acceptance, with the terms on the last form winning, but rejected later.

Election: the offeree has an "election", situation puts someone in position to have to choose
Common law prefers the status quo so if you delay your choice, things will stay as they are
Offer is NOT an election (because dependent on response of other party)
Acceptance IS an election (effective the moment given, can't change your mind)

2. Communication of Acceptance

Generally acceptance must be communicated to the offeror, either by words or actions, in order for a contract to be valid. However because it is purely for the benefit of the offeror he may waive the necessity either explicitly or implicitly (reasonable observer test).

FELTHOUSE v. BINDLEY (1862), 11 C.B. (N.S.) 869, 142 E.R. 1037 (Ex.Ch.) (p.72)
Facts: Uncle (P) sends letter to nephew "will buy horse, assume acceptance if I hear no more" – Nephew never writes back – Horse accidentally sold by auctioneer (D) – Uncle sues Auctioneer after nephew says he intended to sell to the uncle.
Ratio: Silence cannot constitute acceptance as that places an unfair burden on the offeree.
Even if the parties want a contract, there is no K if offeree did nothing to accept the offer.
However, silence can constitute notice of acceptance per Carlill.

CARLILL v. CARBOLIC SMOKE BALL CO. [1893] Q.B. 256 (C.A.) (p.25)
Difference here: no communication of acceptance needed because **performance** of the condition is a sufficient acceptance without notification (unilateral K). Notice of acceptance can be waived by the offeror.

3. When and Where does this communication take place?

Brinkibon v. Stahag Stahl [1983] 2 A.C. 34, [1982] 2 W.L.R. 264, [1982] 1 All E.R. 293 (H.L.) (p.88)
Facts: Buyers (P) in London establish steel contract with Austrian sellers (D) – D breaches contract – Unclear which jurisdiction P can sue under.
***Ratio: A contract comes into existence when and where acceptance takes place. In this case*,** acceptance by Telex machine takes place when it is received in Austria.
Because of these complications, offeror usually includes in their terms, "this contract is subject to the laws of..."

Household Fire & Carriage Accident Insurance Co. v. Grant (1879) 4 Ex. D. 216 (C.A.) (p. 81)
Facts: D offers to buy shares in P – P accepts by post – D never receives acceptance – P sues for balance during bankruptcy. *Was there a K to buy shares, implying D no longer owes $?*
POSTAL ACCEPTANCE RULE: Post office is an agent of both parties; therefore acceptance takes place when communication is given to the post office. However, this can create a conflict of interest problem (but statute gives post office immunity) (surprisingly this rule still applied)
1. fairness issue - who bears the burden
2. easier to establish when it was put in post as opposed to when received
3. offeror could have specified they needed to receive it in person
The Courts are aware of the postal acceptance rule, which is still valid, but often find some reason why it doesn't apply - the dissenting opinion of Bramwell J. in *Household* is now often used instead, such as in case below:

Postal Acceptance Rule - Exception!
Holwell Securities v. Hughes [1974] 1 W.L.R. 155, [1974] 1 All E.R. 161 (C.A.) (p.85)
Facts: P sends acceptance (purchase house) to D by post which does not arrive – D's offer said that notice must be given in writing – Is the postal acceptance rule still valid?
Ratio: The "post" rule does not apply if, having regard to all the circumstances, including the nature of the subject matter under consideration, the negotiating parties cannot have intended that there should be a binding agreement until the party accepting an offer or exercising an option had in fact communicated the acceptance or exercise to the other.
- or if absurd or inconvenient
- "notice in writing" was to be one "to the Intending Vendor" stipulates must be made known to D
- can use this to argue that postal acceptance rule cannot be used with regard to land

C. TERMINATION OF OFFER

We agree there was an offer, but was it valid or terminated before the acceptance? Termination can happen in a variety of ways:

Offeror	Offeree	The Law Itself
revocation	rejection	lapse of time

1. REVOCATION (by offeror)

Byrne v. Van Tienhoven (1880), 5 C.P.D. 344 (p.100)

Facts: All communications by post: D offers to sell 1000 boxes of tin plates on 1st – received and accepted by P on 11th and again on 15th – D sends revocation on 8th, but not received until 20th. On assumption they had purchased plates, Ps had already sold them to a 3rd party

Ratio: Offers can be revoked at any time before acceptance (immaterial of the fact it is expressed as open for acceptance for a given time or not), but revocation must be communicated. The postal acceptance rule does not apply to revocations.

A person who has accepted an offer not known to him to have been revoked, shall be in a position safely to act upon the footing that the offer and acceptance constitute a contract binding on both parties. (uncommunicated revocation is not revocation) Judgement for P.

This case also used to show that there is no consensus needed by both parties at same time. Revocation can be communicated through actions or grapevine but then taking a risk

Dickinson v. Dodds (1876), 2 Ch.D.463 (C.A.) (p.97)

Facts: D offers to sell house on 10th, says offer open until 9am on 12th – P hears 3rd party bought the house – P sends in his formal acceptance – sues for specific performance

Ratio: A person who has given to another a certain time within which to accept an offer is not bound by his promise to give that time.

D not bound by his statement about keeping the offer open as there was no consideration. P can't accept an offer that he knows no longer exists because someone else accepted (indirect revocation) - no need for formal notice, sufficient person has actual knowledge that person has done something inconsistent with continuance of the offer, no binding K between D & D.

2. UNILATERAL CONTRACTS

Generally can't revoke after performance on a contract has started and this has been communicated to the offeror. If the offeror revokes, the offeree may generally sue under the law of restitution if he has started meeting the terms.

Carlill v. Carbolic Smoke Ball Co. [1893] Q.B.256 (C.A.) (p.25)

Difficult to determine when a unilateral contract is accepted, and therefore when an offer can no longer be revoked, but generally taken to mean when performance has started.

Errington v. Errington and Woods [1952] 1 K.B. 290, [1952] 1 ALL E.R. 149 (C.A.) (p.102)
Facts: Father buys a house for son and daughter-in-law – says the house will be theirs when they pay off the mortgage – father helps make a few payments – father dies and widow sues the couple for the house.
Can be viewed as a unilateral contract in which case the couple have started performance via the payments and can't be legally removed unless they miss a payment. Could also be a bilateral contract (house for payment) in which case they still can't be legally removed unless they miss a payment.
In the context of an unilateral contract, where you have already begun to fulfill the terms and I know that you have, then I cannot revoke the offer since it is unjust enrichment.
Remedy would be to return the $, not force the contract - compensation only.

3. Rejection and Counter-Offer

Offeree is given an election to accept or reject the offer. Election requires communication - you simply tell them, whether they act on that or not does not matter. Comes a time when law requires you to decide.

Livingstone v. Evans [1925] 4 D.L.R. 769 (Alta S.C.) (p.54)
Facts: D offers to sell land for $1,800 – P asks for $1,600 – D says "cannot reduce price" – P accepts $1,800 – D denies contract
Did the intervening telegram put an end to his offer? Was P's counter-offer a rejection of D's offer which freed them from it? **There was a binding contract for the sale of this land to P because D's original offer was still open and P accepted it.** renewal of offer

4. Lapse of Time

No offer is open for eternity; will lapse. If doesn't say, how long do you have to accept?
From perspective of offeror (Barrick) - traditional approach
From perspective of offeree - did offeree elect to reject before accepted? this gives more time (Manchester case)

BARRICK v. CLARK [1951] S.C.R. 177 (p.103)
Facts: Parties in long negotiation to sell land – P offers to sell on 20th – Wife of D replies that he is away, asks for an extension – D returns on 10th, tries to accept – P had already sold.
Ratio: An offer remains open only for the time stated in the offer or, if no time is mentioned, for a reasonable time having regard to the nature and circumstances of the offer provided that it has not in the meantime been withdrawn. Here the parties used language that implied they wanted immediate responses. Asking for an extension has no effect. P wins.

D. Certainty of Terms and Intention to Create Legal Relations

1. Certainty of Terms (chapter 4)

There can't be an offer unless there is certainty of terms.

Problems:
1. Too little is said - law can imply into the contract/offer the needed info
2. Too many possibilities from the info - too ambiguous - subject to implied term

(i) Incomplete Terms

Originally courts wanted to make sure that each term in a contract was explicit (May & Butcher) but they have since moved away from that position. Now courts try to interpret the wishes of the parties and whether or not they desired a contract to exist (Hillas v. Arcos and others).

***May & Butcher v. R.* [1934] 2 K.B. 17 (H.L.) (p.119)**

Facts: P agrees to buy excess "tentage" from the state following WWI – K only says price and frequency will be determined from time to time with an arbitrator if necessary.

OLD RULE: All terms must be explicit, so there is no K here. As there is no K, the arbitrator is void (Catch-22), can't be saved through the Sale of Goods Act because the K contained a provision for finding price already, and the court interpreted that to mean that the reasonableness provision was voided. D wins.

Ratio: An agreement between two parties to enter into an agreement in which some critical part of the contract matter is left undetermined is no contract at all! But Court contemplated that the Sale of Goods Act might have helped here, however, since parties stipulated a mechanism/method to get to price, then couldn't use SGA

Why was the Court so difficult, why didn't they use the Act to save the contract? criticism

Sale of Goods Act, ss. 12 & 13 (don't use this in exam!)

Ascertainment of price

12 (1) The price in a contract of sale may be

(a) set by the contract,

(b) left to be set as agreed in the contract, or

(c) determined by the course of dealing between the parties.

(2) **If the price is not determined in accordance with subsection (1), the buyer must pay a reasonable price.**

(3) What is a reasonable price is a question of fact dependent on the circumstances of each case.

Agreement to sell at valuation

13 (1) If there is an agreement to sell goods on the terms that the price is to be set by the valuation of a third party, and the third party cannot or does not do so, the agreement is avoided.

(2) If the goods or any part of them have been delivered to and appropriated by the buyer, subsection (1) does not apply and the buyer must pay a reasonable price for the goods.

(3) If the third party is prevented from making the valuation by the fault of the seller or buyer, the party not in fault may maintain an action for damages against the party in fault.

[13 means: if the price is left to a 3rd party and it does not set a price, then there is no K, but the buyer will pay a reasonable price for anything already delivered]

If the parties have talked about price or another missing term in another context, then you can imply the term by virtue of the parties' intention (pattern of behaving, industry practice, usage)

Hillas & Co. v. Arcos Ltd. (1932), 147 L.T. 503 (H.L.) (p.122)
Facts: P has an option K to buy 100,000 units of timber at a 5% discount – D wants to sell to someone else, says lack of delivery terms void K.
Overrules *May & Butcher* (which would drive business parties away from resolving disputes before the courts): Courts should not create a K where there isn't one, but should try to preserve one if the parties intended it to exist, as they did here. P wins.

Foley v. Classique Coaches Ltd. [1934] 2 K.B. 1 (C.A.) (p.126)
Facts: D buys P's land on the condition that they also buy all their gas from him – price to be agreed in writing as necessary (from time to time), using an arbitrator if required – after 3 years D tries to escape due to vagueness.
Ratio: There is an effective and enforceable contract, although as to the future no definite price had been agreed upon. Parties acted for years as if the K was valid. So long as gas is of reasonable quality and price, the K should be valid. P wins.

(ii) Ambiguity
Solutions:
1. Simply ignore the ambiguous term - works if K is still clear w/o it, is term important?
2. Use Canons of Construction - exclusionary rule, statutes, etc.
3. Implication - imply it into the contract through history between parties, context - do this last!!

Empress Towers Ltd. v. Bank of Nova Scotia [1991] 1 W.W.R. 537, 73 D.L.R. (4th) 400 (C.A.) (p.131)
Facts: D is tenant of P – Rental agreement allows extension if parties agree on market price – P doesn't agree, wants a higher price.
Ratio: A contract to form a contract is void, and there is no duty to agree, only to bargain in good faith. P can't rent the space to anyone else at a price that D was willing to pay.
Absence of good faith led to no property remedy at all.
Courts are giving some meaning to "good faith" here, but this shifted with Mannpar

Mannpar Enterprises Ltd. v. Canada (1999), 173 D.L.R. (4th) 243 (B.C.C.A.) (p.134)
Facts: P had K with government to remove gravel (for Skyway Band)– could renew at a negotiated rate – D didn't want to negotiate rate – P sues.
Good faith requirement differs from Empress as there is no benchmark. Courts can imply terms that are necessary, not because they are good.
A duty to negotiate is unworkable in the absence of an objective benchmark or standard against which to measure the duty - "in good faith" not enough
Note: In Empress the courts allowed a good faith argument as it was a defence (shield), but in Mannpar, it was rejected as it was used in a offensive capacity (sword).

2. Intention to Create Legal Relations (chapter 3)
Courts presume no K between familiar parties (friends, family, etc.) unless explicitly stated.
Courts presume K between unfamiliar parties (companies, strangers, etc.) unless explicitly stated against. Old cases = distance stance of Courts, New cases = more likely to intervene

a) Family Arrangements

Balfour v. Balfour [1919] 2 K.B. 571 (Eng. C.A.) (p.243)

Facts: Husband promises to pay wife a monthly allowance while he is abroad – Couple splits and he stops paying – Wife sues.

Ratio: The arrangements made between husband and wife do not result in contracts at all because the parties did not intend that they should be attended by legal consequences. Family and social agreements are not enforceable as contracts because that would burden the courts. Today there would be other remedies for the wife. ***OUTDATED!***

b) Commercial Arrangements

Rose and Frank Co. v. J.R. Crompton and Bros. Ltd. [1923] 2 K.B. 261 (C.A.) (p.246)

Facts: P had distributed D's paper for years under contract (until 1913) – parties create a new deal based on good faith that excluded legal relations – D stops orders, P sues.

Parties' intentions should stand in court, as is the case here. No K. D wins. However, today this decision could very likely go the other way based on the actions of the parties.

III. ENFORCING PROMISES

Enforcing Promises Chart (page 72)

Enforcing Promises: Getting What Was Promised (page 72)
Who Can Be Involved? [Chapter 6]
1. Who is a party to the contract? - "privity" of contract 2. Circumventing Privity: **- action by a contracting party to benefit third party (in s.p. situation)** **- argue one party is agent for third party** - argue there is a second, "collateral", contract - "buy" contract position by taking assignment - interpret contract as trust to benefit third party 3. Exceptions to Privity: - statutory exception - third party allowed to use some contractual defences to tort claims
How to Enforce the Promise?
A. Through Contract Devices [Chapter 7] 1. **Seal** - if person who makes promise affixes seal 2. **Consideration** - if person who gets promise gives consideration at time of agreement, including a fresh action or a return promise creating new duty
B. Through Promissory Estoppel [Chapter 8] - limitations on use: - only to modify existing obligation - must be equitable - might not be permanent

A. CONSIDERATION (chapter 7)

1. Nature of Consideration and Seals

Consideration is a given on a term by term basis, not for the whole contract. Signing a document under seal (a formality attached by the promisor) can replace consideration.

Royal Bank v. Kiska [1967] 2 O.R. 379, 63 D.L.R. (2d) 582 (C.A.) (p.252)

Facts: P sues D for breach of contract after he wrote the word seal next to his signature.
Ratio: In order to constitute a sealed document, it must be sealed with a seal or a representation of a seal, but cannot merely have words "sealed" included in it. Must be sealed by the promisor. Majority accepts that there is a contract based on consideration, dissent would've said no contract as the seal was not formal enough. Note: An agent can't enter a contract under seal for a principal. P wins.
Dissenting Laskin is the authority on seals in Canada - only part named in it can sue or be sued

Thomas v. Thomas (1842), 2 Q.B. 851, 114 E.R. 330 (p.169)

Facts: Husband leaves series of homes to his brother – on death bed says he wants his wife to live there – allowed – but brother's estate (D) tries to evict – wife (P) sues.
Ratio: Consideration must be of value in the eyes of the law, moving from the promisee; it may be of some benefit to the P or some detriment to the D; but at all events it must be moving from the P. Motive (here to respect husband's wishes) is not consideration. Wife paying token rent of 1 pound per year and keeping the house in repair is consideration. P wins.

Definition of Consideration Chart

Consideration
assessed on a promise-by-promise basis (not whole contract basis)
the "price" of the promise negotiated by the parties (given in exchange for promise)
must move from the promisee
a benefit to promisor or burden to promisee or both
can move to a third party
must be given at the time of the promise for which it is the price
can be an action or the promise of an action
distinguished from MOTIVE, Adequacy/Sufficiency, CONDITIONS of a contract
failure of consideration refers to certain types of breaches of contract, no absence of

Conditions of a K

I will shovel your driveway if it snows (condition precedent)
I will shovel your driveway until spring arrives (condition subsequent)
I will shovel your driveway when you give me the promised $25 (consideration!)

2. Adequacy of Consideration

Freedom of contract allows parties to trade peppercorns for diamonds if they so wish.

Mountford v. Scott [1975] Ch. 258, [1975] 2 W.L.R. 114, [1975] 1 All E.R. 198 – Supp. 16

Facts: D gives P the option to buy his house for £1 – attempt at revocation fails as the offer had already been accepted.

Ratio: Anything of value, however small the value, is sufficient consideration to support a contract at law. P wins.

Valueless Consideration = where anything depends on the whim of the promisee "if I feel like it"

3. Past Consideration

Not adequate consideration as it is not FRESH; must give something new. What was done in the past is not part of the bargain.

Eastwood v. Kenyon (1840), 11 Ad. & E. 438, 113 E.R. 482 (Q.B.) (p.166)

Facts: P was the guardian of a girl who married D – P paid for girl's education, D promised to pay for it, doesn't, argues no consideration – P claims consideration was money he spent on girl in the past.

Consideration took place before D even knew P. Past consideration is not good consideration. D wins.

Exception to the Rule of Past Consideration!

Lampleigh v. Brathwait (1615), Hobart 105, 80 E.R. 255 (K.B.) (p.168)

Facts: P goes to get a pardon from the King for D – D promised an initially vague reward – later promises £100 but refuses to pay.

Emergency doctrine: promises coupled with the expectation of an action can become binding. If a vague reward (no consideration) is promised and then made explicit (consideration) the promise becomes binding despite the timeline of events. P wins.

Ratio: If you have a situation where, because of circumstances, it is not feasible for one party who is requesting something from a party, to negotiate what will be given in return, at that time, but does later then there can be an exception to the no past consideration rule

4. Forbearance

Promise not to do something is valid consideration so long as the promisor actually has that right.

Callisher v. Bischoffsheim (1870), L.R. 5 Q.B. 449 (Eng. Q.B.) (p.171)

Facts: D owes P money, offers to give him a bond if he doesn't sue for it – P agrees – D doesn't pay; says no consideration.

Promise not to sue is valuable. P wins. Note that if he didn't actually have the ability to sue then a promise to avoid suing based on a threat is not valid consideration. Problematic.

5. Pre-Existing Legal Duty - Third Party

A promise to honor a commitment to a third party is valuable as now the promisor is liable to two different parties. The same could be said of a pre-existing legal duty to the state or society, but this is not covered in case law.

Pao On v. Lau Yiu Long [1980] A.C. 614 (P.C.) (p.173)

Facts: P owns company SO, D owns company FC – D wants the building owned by SO – P agrees to sell shares in SO to FC and agrees to sell shares in FC in one year to D – Agreement with D later revised to a put option, P offers promise to complete deal with FC as consideration – D doesn't buy when value falls.

FC and D are distinct legal entities, so promising D to uphold a contract with FC is valid consideration, as P is now liable twice. P wins. Court also approves defence of economic duress to prevent exploitation of similar situations.

Ratio: A promise to perform, or the performance of, a pre-existing contractual obligation to a third party can be valid consideration (creating something new)

Eliminate rule of consideration in this type of scenario and look at law of economic duress instead. *Note: the Lampleigh exception on past consideration is distilled here and perhaps broadened.*

6. Pre-Existing Legal Duty - Same Party

Generally there is no consideration when you promise something to another party that you had already promised. However even slight variations in the promise can lead to consideration. The doctrine has also evolved to allow binding contracts that benefit both parties even if nothing new is promised.

Agreement to Pay More - Rule

Gilbert Steel v. University Construction Ltd. (1976), 12 O.R. (2d) 19, 67 D.L.R. (3d) 606 (C.A.) (p.178)

Facts: P has K to deliver steel to D – wants to raise prices partway through on vague promise of a good future price – D says ok but doesn't pay new price on lack of consideration – P says promise of future price, proportional credit increase are consideration or that price increase led to a new K or that since D accepted estoppel should apply.

Ratio: P has offered nothing new in exchange for more from D. Promise to let someone pay you more and enabling them to do so is not consideration. Variation in price is a modification, not a new contract. Estoppel can't be used as a sword. D wins.

Argument there was: 1) promise to provide good price - too vague

2) oral contract rescinded 2nd K 3) 1st K = credit for 60 days, 2nd K = credit higher

enforce with promissory estoppel

- to get around it, cancel original contract and create a new one

Agreement to Pay More - Exception!

Greater Fredericton Airport v. NAV Canada (2008), [2008] N.B.J. No. 108 (N.B.C.A.) (p.186)

Facts: P has K with D and needs runway equipment moved – D wants P to pay for new equipment instead – P signs a letter agreeing to pay for it – P then sues saying there was no consideration.

Consideration should no longer be as strict for the sake of commercial efficiency. Parties should be able to modify contracts slightly if both benefit. P benefited from D buying the equipment.

Does not overrule *Gilbert Steel* as both parties must benefit. Also allows for economic

duress claims which P used to win. Promise modified enforceable without considering consideration. **A post-contractual modification(sincerely and genuinely negotiated), unsupported by consideration, may be enforceable so long as it is established that the variation was not procured under economic duress.**

Agreement to Accept Less
Accord and Satisfaction

(name of a type of K where parties have existing obligations but modify them in a binding way)

Foakes v. Beer (1884), 9 App. Cas. 605 (H.L.) (p.192)

Facts: P owes D money, offers to set up a mortgage structure to pay it back – D accepts payments then wants interest because the promise did not offer consideration.
P can't offer to pay less in exchange for D accepting less. No consideration here. D wins.
Ratio: Payment of a lesser sum in satisfaction of a greater sum is not satisfaction of the whole. Must add something so that you are giving something new in exchange

Agreement to Accept Less - (1) Method through Consideration

Foot v. Rawlings [1963] S.C.R. 197, 41 W.W.R. 650, 37 D.L.R. (2d) 695 (p.197)

Facts: D owes P money – say he will pay by cheque instead of notes if P will accept less – P later sues for remainder.
D's offer to pay through a different method is valid consideration as it was a promise accepted by P.
Ratio: Paying less, but in a different form, is enough.

(2) Method through Statute - Law and Equity Act, section 43
Rule in Cumber v. Wane abrogated (essentially says same thing as *Foakes v. Beer*, statute only directed to particular situation)

43 Part performance of an obligation either before or after a breach of it, when expressly accepted by the creditor in satisfaction or rendered under an agreement for that purpose, though without any new consideration, must be held to extinguish the obligation.

(3) Method of Estoppel

B. Waiver and Promissory Estoppel

Waiver = someone has an entitlement and gives it up - if can't explain it through statute or consideration (perm) then could explain it through promissory estoppel (temp)
(waiver can be used as a synonym for p.e.)

Estoppel can be used to hold a party to a previously made promise if the other party has relied on said promise and it would be to their detriment if the other party was allowed to abandon it. It must only be used in a defensive manner (as a ***"shield"*** and not as a "sword") except in Australia and must be used in a context which was intended to be legally binding. Estoppel can't be used vaguely, the promise must be explicit for the promisee to use it.

Suspensory only - maker held to promise until sufficient notice given to end estoppel if equitable

Central London Property Ltd. v. High Trees House [1947] 1 K.B. 130, [1956] 1 All E.R. 256 (p.203) **Facts:** P grants subsidiary D an apartment block – during WWII apartment isn't full and P offers to let D pay less while this persists – after WWII P sues for the balance of the payments post WWII – D contends that the promise was perpetual and that there was no consideration.
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 (promissory estoppel) *- cause of action & defense*
A promise to accept a smaller sum in discharge of a larger sun, if acted upon, is binding even if no consideration. - *defense only.* Parties who make such a promise can't go back on it, but no damages will arise. However the promise only intended to last WWII so P still wins.
Must have been detrimental reliance by promisee.

John Burrows Ltd. v. Subsurface Surveys Ltd. [1968] S.C.R. 607, 68 D.L.R. (2d) 354 (p. 205) **Facts:** D bought land from P on the condition that P could claim a lump sum if any monthly payments were late – P accepted late payments for a while then sued for the whole amount when another payment was late
Estoppel must feature a clear promise (not implied promise). Burrows never explicitly waived his right to claim the lump sum. While he might have made an implicit promise each time he accepted a late payment, he could still sue on future late payments. P wins. - pattern of waiver (habitually)

D & C. Builders Ltd. v. Rees [1966] 2 Q.B. 617, [1975] 3 All E.R. 837 (C.A.) (p.208)
Facts: P does work for D – D does not pay and forces P to accept less as he knows they are desperate for money – P sues for remainder.
Creditor who promises to accept less is now bound to that promise (overrules Foakes). However estoppel claims can't succeed by forcing the other party into duress, so P wins here.
Fairness considerations - must be true agreement, not pressure (PM cannot be used v builder in this case)

Combe v. Combe [1951] 2 K.B. 215, [1951] 1 All E.R. 767 (C.A.) (p.224)
Facts: Husband (D) and wife (P) separate – husband promises to support wife but doesn't pay – wife sues based on estoppel.
Estoppel should not lead to new causes of action; it just exists to limit legal rights.
Promissory estoppel can't create a right, but can be part of a cause of action (i.e. you are stopped from bringing up a certain defense) - ***"Shield not a sword." Estoppel must be used in the context of legal relations.*** Wife would need consideration to enforce this promise, and she has none. D wins.

Waltons Stores (Interstate) Pty. Ltd. v. Maher (1988), 62 A.L.J.R. 110 (H.C.) (p.230)
Facts: P intends to lease land from D via K – parties have a verbal promise to demolish a building which D does – P later claims no intention to proceed and sues – D wants specific performance and claims that not speaking contrary to the understanding allows for a new kind of estoppel claim.
Court removes restrictions on estoppel *(Combe v Combe - shield not a sword)* ***to allow it to rectify unconscionable outcomes based on promises even outside of legal relations.***
Court found no reason to keep promissory estoppel as a shield only, borrowed from other kinds of estoppel; all forms of estoppel should be used to limit detrimental reliance. Other jurisdictions worry about how this will lead to more litigation. Canadian courts would likely use restitution to solve this kind of problem instead of contracts or estoppel. ***Not accepted in Canada!***

Walton Stores relied on the promise that lease would go through, has already demolished building on the property when Maher backs out, no contract but court uses PM (PM leads to contract, not undermining it)
PM can also apply in holding to a promise to give more
Must show detrimental reliance, promise or assurance AND that unconscionability would result if promise not enforced

M. (N.) v. A. (A.T.) (2003), 13 B.C.L.R. (4th) 73 (B.C.C.A.) (p.239)
Facts: P offers to pay D's mortgage if she marries him – D quits job and moves to BC – P doesn't pay mortgage but gives D other money – couple splits.
Parties must intend to enter legal relations in order for estoppel to apply. The law does not assume that legal relations exist in a social relationship and thus D's estoppel claim fails. P wins. Court seems to indicate that Waltons would be followed if prerequisites were met.

C. Privity

1. THIRD-PARTY BENEFICIARIES

Privity: Who can enforce a K – Abolished everywhere except common law Canada.
Horizontal: A and B have a K for C's benefit. Generally, C can't sue either.
Vertical: A has a K with B who has a K with C. Generally, A and C can't sue each other.

Ways around privity:
Agency: K exists between the principle and 3rd party, not the agent.
Trust: K exists between the beneficiary and the settler, not the trustee.
(Irrelevant via trust law)
Specific Performance: See *Beswick*; party to a K can sue for it on behalf of 3rd party.
(Rare)
Employment: See *London Drugs*. (Expanded in *Fraser River*)
General: See *Fraser River*. (Very narrowly used)

Horizontal Privity:
Tweddle v. Atkinson (1861), 1 B. & S. 393, 121 E.R. 762 (Q.B.) (p.276)
Facts: P's father has K with 3rd party to pay P (marriage settlement) – 3rd party doesn't pay – P sues – Note K enables P to sue.
Only a party who has provided consideration can sue. Horizontal privity applies. The K can't give P the power to sue. Family bonds do not confer consideration. D wins.
Son cannot sue because he is not privy to agreement; father can sue but suffered no loss, therefore no damages.

Vertical Privity:
Dunlop Pneumatic Tyre Co. Ltd. v. Selfridge & Co. Ltd. [1915] A.C. 847 (H.L.) (p.277)
Facts: P sells tires to 3rd party wholesaler (Dew) on condition that his buyers refrain from reselling below list price – D buys from wholesaler and sells below list price. Dunlop - Dew - Selfridges.
Vertical privity applies. P can't sue a party in contract that he doesn't have a contract with. Claim that Dew was acting as an agent of Dunlop was rejected as it was not explicit. D wins. Judges uphold this but don't like it.

2. CIRCUMVENTING PRIVITY

A. Specific Performance

Beswick v. Beswick [Court of Appeal] [1966] 1 Ch. 538, [1966] 3 All E.R. 1 (C.A.) (p.283)
Facts: Nephew (D) buys uncle's business for separate annuities to uncle and aunt (P) – D stops paying once uncle dies – P sues in capacity as executor and in her own right.
Widow can sue for specific performance in her role as executor to force the nephew to honor the contract. ***Denning goes further and tries to abolish privity so that the widow would be able to sue in her own right as she has a legitimate interest in the contract.***

Beswick v. Beswick [House of Lords] [1968] A.C. 58, [1967] 2 All E.R. 1197 (H.L.) (p.284)
Facts: Nephew (D) buys uncle's business for separate annuities to uncle and aunt (P) – D stops paying once uncle dies – P sues in capacity as executor and in her own right.
Decision upheld, but ***Denning's extra doctrine is struck down. Parties may only sue if they are parties to a contract,*** and thus the widow can sue as executor for specific performance but not as herself. P wins. Privity not circumvented.

A party to the contract can try to get specific performance since they have not lost anything (damages), which will then help the 3rd party.

B. **TRUST** (fiduciary duty)
C. **AGENCY** (argued in Dunlop, but if you are agent then you yourself don't have contract)
D. **Assignment Contract** (could sell your position in a contract, but can't be enhanced by new "owner" and damages assessed based on when K originally established

E. EMPLOYMENT - True exception to privity introduced for employment contract

London Drugs Ltd. v. Kuehne & Nagel Intl Ltd. [1992] 3 S.C.R. 299, 97 D.L.R. (4th) 261 (p. 298) **Facts:** P delivers transmitter to D for storage, does not buy insurance beyond $40 – D's employees damage transmitter, P sues D and employees – employees say liability limited to $40 even though they were not party to the K between P and D.
A third party to a contract that was created to benefit them can use a defence (not as a cause of action) from that contract that was intended to benefit the third party. In this case the context was confined to employees acting for their employer. So more specifically, privity is voided and employees are allowed to claim benefits that were intended for them in contracts between their employers and 3rd parties. D wins.

Fraser River Pile & Dredge Ltd. v. Can-Dive Ser. Ltd. [1999] 3 S.C.R. 108, 176 D.L.R. (4th) 257 (p.310) **Facts:** P's barge sinks while under charter to D – P's insurance agreement waived the right for the insurer to claim against D (no subrogation clause) – insurer and P edited K to remove waiver – D tries to invoke the waiver in a defence.
Restriction on limiting London Drugs to employment settings removed. Test should depend on the intentions of the parties and if the third party was acting in accordance with the contract. Waiver clearly intended to have meaning. P and the insurer can't take away D's rights. D meets second test by chartering the barge. Contract law should reflect the commercial reality. D wins. At the time the tort occurred, for the purposes of D, the contract is frozen in time (crystallized) as it existed then (with no subrogation clause) - can't deprive someone of a needed benefit they would have had at the time (equity)